Appendix “A”

Appendix "A"

List of Applicants

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICEsurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

Appendix “B”

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 15
	:	
Arctic Glacier International, Inc.	:	Case No. 12-10605(KG)
	:	(Jointly Administered)
Debtors in a foreign proceeding.	:	
	:	
Eldar Brodski Zardinovsky a/k/a Eldar Brodski a/k/a Eldar Brodski (Zardinovsky), EB Books, Inc., EB Design, Inc., EB Online, Inc., EB Imports, Inc., Lazdar Inc., Eldar Brodski Inc., Y Capital Advisors Inc., Valley West Realty Inc., Ruben Brodski, Ruben Brodski Inc., Ester Brodski, and Yehonathan Brodski,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Adv. No. 15-51732(KG)
	:	
Arctic Glacier Income Fund, James E. Clark, Gary A. Filmon, David R. Swaine, and Hugh A. Adams,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OPINION

On October 30, 2015, Eldar Brodski Zardinovsky and others[1] (collectively "Plaintiffs") brought a post-petition adversary complaint ("Complaint" or "Compl.") (D.I. 1) against Arctic Glacier Income Fund ("AGIF"), James E. Clark, Gary A. Filmon, David R. Swaine, and Hugh A. Adams (collectively "Defendants" or, in reference to aforementioned persons, "Individual Defendants") for negligence, breach of fiduciary duty, negligent misrepresentation, violation of § 10(b) of the 1934 Securities Exchange Act

[1] EB Books, Inc., EB Design, Inc., EB Online, Inc., EB Imports, Inc., Lazdar Inc., Eldar Brodski Inc., Y Capital Advisors Inc., Valley West Realty Inc., Ruben Brodski, Ruben Brodski Inc., Ester Brodski, and Yehonathan Brodski.

and Rule 10b-5, and common law fraud. Defendants filed a Motion to Dismiss the Complaint (the "Motion") (D.I. 15) on January 21, 2016. On March 14, 2016, Plaintiffs filed their Opposition to the Motion ("Opp.") (D.I. 27). Defendants filed a Reply Brief in Support of the Motion on April 7, 2016 ("Reply") (D.I. 30). The Court heard oral argument on April 19, 2016 ("4/19/16 Hr.").[2]

This case is about the preclusive effect of Defendant AGIF's confirmed reorganization plan (the "Plan") in regard to its dividend distribution[3] procedure, as well as the effectiveness of various provisions in the Plan and related orders (the "Orders") that release Defendants from liability associated with their payment of dividends (the "Releases"). Plaintiffs purchased shares, called units, in AGIF between and including December 16, 2014 and January 22, 2015. On January 22, 2015, pursuant to the Plan's distribution procedure, Defendants paid dividends to those who held units as of December 15, 2014 – in other words, to those who sold their units to Plaintiffs (the "Selling Unitholders[4]"). The Complaint alleges that under U.S. securities law, Defendants should have paid dividends to Plaintiffs, rather than to the Selling Unitholders.

[2] The Court has jurisdiction pursuant to Paragraphs 3(c) and (d) of its Order Recognizing and Enforcing the Unitholder Claims Procedure Order of the Canadian Court ("Recognition Order"), entered on September 16, 2014 (D.I. 17-5). The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(P). Plaintiffs consent to the entry of a final order or judgments by this Court pursuant to Local Rule 7008-1 of the Delaware Bankruptcy Court. Venue is proper in this District and in the Court under 28 U.S.C. § 1410.

[3] Although the term *corporate distribution* includes *dividend payment* as well as other forms of money transfers to shareholders, this Memorandum Opinion will refer to *distributions* and *dividends* interchangeably. *See* DISTRIBUTION, Black's Law Dictionary (10th Ed. 2014).

[4] "Unitholder" is the term used in the Plan for shareholders.

The Motion contends that the Releases insulate Defendants from liability. Motion ¶¶ 26-31. It also asserts that under the doctrine of *res judicata* Defendants were only obligated to make distributions pursuant to the Plan, not U.S. securities law, and therefore Defendants violated no law when paying dividends. Motion ¶¶ 24-25, 52-58.[5]

Plaintiffs mount several challenges to Defendants' defenses, arguing that (1) U.S. securities law imposed "concurrent and additional obligations" on Defendants that they failed to meet (Opp. ¶¶ 51, 61), (2) that the Releases apply only to Defendants' distributions to the Selling Unitholders, not the required payments to Plaintiffs that Defendants omitted (Opp. ¶ 51), (3) that the Releases violate Plaintiffs' Due Process rights under the U.S. Constitution (Opp. ¶¶ 46-51), and (4) that the Releases are ineffective as to the Individual Defendants (Opp. ¶ 51). The Court finds the challenges insufficient to withstand the Motion. Therefore, the Court will grant the Motion.

FACTS

A. The Parties

Defendant AGIF was an income trust headquartered in Canada and listed on the Canadian Securities Exchange ("CSE"), under the symbol "AG.UN." Compl. ¶ 18; Motion ¶¶ 7, 12; Declaration of Marcos A. Ramos, Esq. in Support of Defendants' Motion to Dismiss the Complaint (D.I. 17)("Ramos Dec."), Ex. A (First Report of the Monitor Alvarez & Marsal Canada Inc., In re Arctic Glacier International Inc., et al., No. CI 12-01-

[5] The Motion also defends against each of Plaintiffs' causes of action on the merits. The Court finds it unnecessary, however, to address Plaintiffs' claims individually on the merits since under the following analysis they are collectively dismissed.

76323 (Can. M.Q.B. Mar. 12, 2012)("First Monitor's Report") ¶ 3.1), Ex. I ("Arctic Glacier Income Fund Announces Unitholder Distribution Record Date," December 15, 2014, press release posted to the CSE ("December 15, 2014 Press Release")).[6] AGIF's units traded on the U.S.-based Over-The-Counter ("OTC") market under the symbol "AGUNF." Compl. ¶¶ 31, 34, 53, 60; Opp. ¶ 6.

Individual Defendants James E. Clark, Gary A. Filmon, and David R. Swaine have at all relevant times been Trustees of AGIF; Individual Defendant Hugh A. Adams has at all relevant times been Secretary of AGIF. Compl. ¶¶ 19-22; Motion ¶ 7.

Plaintiffs purchased all their AGIF units on the OTC through U.S. brokers between and including December 16, 2014, and January 22, 2015. Compl. ¶¶ 50, 53, 55.

B. AGIF's Bankruptcy Proceedings

On February 22, 2012, AGIF and its affiliates ("Debtors") initiated insolvency proceedings in Canada under the Companies' Creditors Arrangement Act ("CCAA"). Compl. ¶ 26. The CCAA Court issued an order under the CCAA dated February 22, 2012 ("Initial Order"), which appointed Alvarez & Marsal Canada Inc. as Monitor (the "Monitor") of Debtors and permitted Debtors to file a plan of compromise or arrangement. Ramos Dec., Ex. B (Plan of Compromise and Arrangement, dated May 21, 2014 (as amended August 26, 2014 and January 21, 2015) (the "Plan," as referred to in the Introduction, *supra*)). Debtors filed the Plan on May 21, 2014. Compl. ¶ 28. Also on

[6] Under the motion-to-dismiss standard, *see* Legal Standard section, *infra*, the Court takes judicial notice of publicly available documents. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993).

February 22, 2012, the Monitor commenced ancillary proceedings in the Court under Chapter 15 of the United States Bankruptcy Code. Compl. ¶ 26; Motion ¶ 8; First Monitor's Report ¶ 4.1.

Debtors' creditors and unitholders accepted the Plan, with over 65% of unitholders participating in the vote, and 99.81% of the voting unitholders approving the Plan. Ramos Dec., Ex. C (Monitor's Certificate (Re. Plan Implementation Date), *In re Arctic Glacier International In., et al*., No. CI 12-01-76323 (Can. M.Q.B. Jan. 22, 2015)), Ex. D (Seventeenth Report of the Monitor Alvarez & Marsal Canada Inc., *In re Arctic Glacier International Inc., et al*., No. CI 12-01-76323 (Can. M.Q.B. Aug. 26, 2014) §§ 4.19-.20, Appx. H). The CCAA Court approved and sanctioned the Plan. Ramos Dec., Ex. Q (Sanction Order issued by the CCAA Court on September 5, 2014 ("Sanction Order")). In the Sanction Order the CCAA Court ordered and declared "that the Plan . . . is hereby sanctioned and approved pursuant to the CCAA." Sanction Order ¶ 9. The CCAA Court ordered that the terms of the Plan governed the conduct of the Debtors and related parties as of the signing of the Sanction Order[7]:

> the Arctic Glacier Parties[8], the Monitor and the CPS, as the case may be, ***are hereby authorized and directed to take all steps and actions necessary or appropriate to implement the Plan in accordance with and subject to its terms and conditions, and enter into, adopt, execute, deliver, complete, implement and consummate all of the steps, . . . distributions***, payments, deliveries, allocations, instruments, agreements, and releases contemplated by, and subject to the terms and conditions of, the Plan, and all such steps and actions are hereby approved. Further, to the extent not previously given, all necessary approvals to take such actions shall be and are hereby

[7] The Sanction Order was signed on September 5, 2014.

[8] "Arctic Glacier Parties" is defined in the Plan as including AGIF and various other entities, but not the Individual Defendants. Plan at 1.

> deemed to have been obtained from the Directors, Officers, or Trustees, as applicable . . . .

Sanction Order ¶ 12 (emphasis added).

On September 16, 2014, the Court recognized the Sanction Order and gave "full force and effect in the United States" to its provisions. Ramos Dec., Ex. E (Order Recognizing and Enforcing Order of Canadian Court Sanctioning and Approving CCAA Plan, September 16, 2014 ("Recognition Order") at 2). (The Sanction Order and the Recognition Order will be referred to collectively as the "Orders," as noted in the Introduction, *supra*).

Under the supervision of the Monitor and the CCAA Court, Debtors sold substantially all of their business and assets. Compl. ¶ 27. With the sale proceeds Debtors paid their creditors in full and distributed most of the remainder to unitholders. Compl. ¶ 27; Plan, recitals.

C. Distributions Under the Plan

The Plan presents one, and only one, procedure for making distributions, whether small (below 25% of the value of the subject security) or large (25% or above the value of the subject security):

> The Monitor shall declare a Unitholder Distribution Record Date prior to any distribution . . . . On the Plan Implementation Date or on any Distribution Date, as the case may be, the Monitor shall transfer amounts as determined by the Monitor in accordance with the Consolidated CCAA Plan . . . to the Transfer Agent. . . . in no event later than five (5) Business Days following receipt of the Unitholder Distribution, ***the Transfer Agent shall distribute each Unitholder Distribution . . . to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date*** . . . based on each Registered Unitholder's Pro Rata Share . . . .

Plan § 6.2 Distributions from the Unitholders' Distribution Cash Pool (emphasis added). The Unitholder Distribution Record Date must be "at least 21 days prior to a contemplated Unitholder Distribution . . ." Plan § 1.1 Definitions. Thus, under the terms of the Plan, *any* distribution, no matter its size, must be made to those who hold units as of the Unitholder Distribution Record Date, which must be at least 21 days prior to the date on which the distribution is actually paid out, i.e., the payable date.

Furthermore, the Sanction Order makes clear that the Plan's distribution procedure is comprehensive, precluding, at the Monitor's discretion, any authority beyond the CCAA, the Plan, and court orders:

> THIS COURT ORDERS AND DECLARES that, in addition to the Monitor's prescribed rights under the CCAA, and the powers granted by this Court to the Monitor and the CPS, as the case may be, the powers granted to the Monitor and the CPS are expanded as may be required, and the Monitor and CPS are empowered and authorized before, on or after the Plan Implementation Date[9], to take such additional actions and execute such documents . . . ***as the Monitor and the CPS consider necessary or desirable*** in order to perform their respective functions and fulfill their respective obligations under the Plan, the Sanction Order and any Order of this Court in the CCAA Proceedings and to facilitate the implementation of the Plan and the completion of the CCAA Proceedings, including to . . . (ii) ***administer and distribute the Available Funds***, (iii) establish, hold, administer and ***distribute . . . the Unitholders' Distribution Cash Pool***, . . . (v) effect . . . ***distributions to the Transfer Agent in respect of distributions to be made to Unitholders*** . . . and, in each case where the Monitor or CPS, as the case may be, takes such actions or steps, ***they shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons*** including the Artic Glacier Parties, ***and without interference from any other Person***.

[9] The Plan Implementation Date was January 22, 2015.

Sanction Order ¶ 34 (emphasis added). Under the Plan "'Person' is to be broadly interpreted and includes any . . . Government Authority[10] or any agency, regulatory body, officer or instrumentality thereof or any other entity, wherever situate or domiciled . . ." Plan § 1.1 Definitions, defining "Person."

Section 8.3 of the Plan provides further evidence that the Plan's distribution procedure is comprehensive:

> The steps, transactions, settlements and releases to be effected in the implementation of the Consolidated CCAA Plan shall occur, and be deemed to have occurred, in the following order without any further act of formality . . .
> (a) the Monitor . . . shall use the Available Funds to fund the following reserves and distribution cash pools in the order specified below:
> (i) Administrative Costs Reserve;
> (ii) Insurance Deductible Reserve;
> (iii) Unresolved Claims Reserve;
> (iv) Affected Creditors' Distribution Cash Pool; and
> (v) Unitholders' Distribution Cash Pool; and
>
> administer such reserves and distribution cash pools pursuant to and in accordance with the Consolidated CCAA Plan;
> * * *
> (d) the steps, assumptions, distributions, transfers, payments, contributions, liquidations, dissolutions, wind-ups, reduction of capital, settlements and releases set out in Schedule "B" of the Consolidated CCAA Plan shall be deemed in the order specified therein . . .

Plan § 8.3 Plan Implementation Date Steps and Transactions.

Schedule "B" of the Plan, titled "Specificed Plan Implementation Date Steps," states:

[10] "Government Authority" is defined as "any government, regulatory or administrative authority . . . having or purporting to have jurisdiction on behalf of any nation . . ." Plan § 1.1 Definitions, defining "Government Authority."

> In order to effect the wind-up, liquidation and dissolution of certain of the Arctic Glacier Parties to facilitate the satisfaction of Proven Claims and a distribution by the Fund to Unitholders pursuant to and in accordance with the Consolidated CCAA Plan, the following steps, assumptions, distributions, transfers, payments, contributions, liquidations, dissolutions, wind-ups, reduction of capital, settlements and releases shall be deemed to occur (a) immediately after the completion of the step set out in Section 8.3(c) of the Consolidated CCAA Plan; (b) in the order specified in this Schedule "B"; and (c) in the manner specified in this Schedule "B".

Plan, Schedule "B" Specified Plan Implementation Date Steps. The last step in Schedule "B" is "Step 30: Distribution by Arctic Glacier Income Fund," which reads:

> Arctic Glacier Income Fund shall be deemed to have paid a distribution to each Unitholder in the amount of their Pro Rata Share of the Unitholders' Distribution Cash Pool immediately following the completion of Steps 1 through 29 above and such amount shall be transferred by the Monitor to the Transfer Agent and distributed by the Transfer Agent to the Unitholders in accordance with Section 6.2 of the Consolidated CCAA Plan.

Plan, Schedule "B" Specified Plan Implementation Date Steps, Step 30. Section 8.3 only allows for distributions "in accordance with" the Plan (i.e., section 6.2); Schedule "B" only allows for distributions "in accordance with Section 6.2 of the . . . Plan." There is no room in either section 8.3 or in Schedule "B" for anything other than the narrowly prescribed distribution procedure provided in section 6.2, limiting distributions "to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date . . . ." Plan § 6.2.

Article 6 of the Plan, entitled "Provisions Regarding Distributions and Payments," contains several sections, some of which begin with the prefatory phrase: "Subject to any restrictions contained in Applicable Laws . . . ." Plan §§ 6.10(a) Assignment of Claims Prior to the Creditors' Meeting; 6.10(b) Assignment of Claims Subsequent to the

Creditors' Meeting; 6.11 Assignment of Trust Units for Voting Purposes. Section 6.13 of the Plan regards requirements of the applicable tax authority:

> The Artic Glacier Parties and the Monitor shall be entitled to deduct and withhold, or direct the Transfer Agent to deduct and withhold, from any distribution, payment or consideration otherwise payable to an Affected Creditor or Unitholder such amounts . . . as the Arctic Glacier Parties, the Monitor or the Transfer Agent, as the case may be, ***is required or entitled to deduct and withhold with respect to such payment under the Income Tax Act (Canada), the IRC, or any other provision of any Applicable Law***.

Plan § 6.13 Withholding and Reporting Requirements (emphasis added). In contrast, section 6.2 of the Plan, regarding "Distributions from the Unitholders' Distribution Cash Pool," does not contain any reference to "Applicable Law." The omission indicates that the Plan's drafters did not intend to impose the requirements of any applicable laws on section 6.2. Thus, under the Plan and Sanction Order, the Monitor is obligated to make distributions according to the stated steps in section 6.2 of the Plan, subject only to its own discretion and not to "Applicable Law."

D. Distributions Under the U.S. Securities Laws

Rule 10b-17 of the Securities and Exchange Act of 1934 ("Rule 10b-17") establishes an issuer's mandatory set of disclosures if it trades on the OTC and wishes to make a distribution. Compl. ¶ 56. Notice of a distribution must be given to the Financial Industry Regulatory Authority ("FINRA")[11] no later than 10 days prior to the record date

[11] FINRA is a self-regulatory organization that regulates the OTC market pursuant to authority granted by the Securities and Exchange Commission ("SEC"). Compl. ¶ 1. It is the successor to the National Association of Securities Dealers, Inc. ("NASD"). FINRA News Release, Monday, July 30, 2007, *available at* https://www.finra.org/newsroom/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry-regulatory-authority. FINRA "has the authority to determine the date on which a holder of AGIF units trading in the United States . . . has to own such units in order to receive a dividend." Compl. ¶ 34. "FINRA processes requests

of an issuer's offer of dividends. Compl. ¶ 58; 17 C.F.R. § 240.10b-17(a) and (b)(1); *In re THCR/LP Corp*., No. 04-46898/JHW, 2006 WL 530148 at *4 (Bankr. D.N.J. Feb. 17, 2006). The SEC gave FINRA power to regulate payment of dividends. Compl. ¶ 61; SEC Release No. 34-62434 (July 1, 2010) at *1. FINRA Rule 6490 ("Rule 6490") creates procedures within FINRA for review and determination of the sufficiency of requests to issue dividends. Compl. ¶ 63; SEC Release No. 34-62434 (July 1, 2010) at *1.

FINRA is authorized by the SEC to adopt and administer the Uniform Practice Code ("UPC"), "the rules and regulations governing [OTC] secondary market securities transactions."[12] *In re THCR/LP Corp*., 2006 WL 530148 at *4. UPC Rule 11140 determines which unitholders are entitled to a distribution. *Id*. at *5; NASD Notice to Members 00-

to announce and publish certain corporate actions [including cash dividends and distributions] from issuers whose securities are quoted on the OTC . . . [and] publishes these announcements on the Daily List on its website." Compl. ¶ 35, 36, 37.

[12] "The UPC sets forth a basic framework of rules governing broker-dealers with respect to the settlement of OTC Securities." SEC Release No. 62434 (July 1, 2010), n. 8. FINRA lacks privity with issuers of OTC Securities: "FINRA does not impose listing standards for securities and maintains no formal relationship with, or direct jurisdiction over, issuers." SEC Release No. 62434 (July 1, 2010) at *2-3. Despite the lack of privity between FINRA and issuers, the SEC notes the following possible consequences of an issuer failing to observe the requirements of Rule 10b-17 :

> The other commenter questioned whether the proposed fees for providing Company-Related Action processing services might cause issuers to effect corporate actions without notifying FINRA. ***In response to this point, FINRA noted that an issuer that fails to notify FINRA of a proposed corporate action, as required by Rule 10b-17 is potentially violating an anti-fraud rule of the federal securities laws and stated that where it has actual knowledge of issuer non-compliance with Rule 10b-17, FINRA will use its best efforts to notify the Commission***.

SEC Release No. 62434 (July 1, 2010) (emphasis added).

54 (August 2000). (Hereinafter, Rule 10b-17, Rule 6490, SEC Release No. 62434, UPC 11140, and NASD Notice to Members 00-54 will be referred to as the "FINRA Rules."[13])

The UPC provisions determine which unitholders are entitled to a distribution by setting two dates: the "record date" and the "ex-dividend date" ("ex-date"). *In re THCR/LP Corp*., 2006 WL 530148 at *5. The record date refers to "the date fixed by the . . . issuer for the purpose of determining the holders of equity securities . . . entitled to ***receive*** dividends . . . or any other distributions." UPC Rule 11120(e) (emphasis added). Ex-date means "the date on and after which the security is traded without a specific dividend or distribution." Compl. ¶ 70; UPC Rule 11120(c); *In re THCR/LP Corp*., 2006 WL 530148 at *5. The ex-date can only be set by FINRA and determines which unitholder is ultimately entitled to the distribution. *In re THCR/LP Corp*., 2006 WL 530148 at *5. "Taken together, these two dates delimit the timeframe during which a security, when sold, carries with it from the seller to the buyer the right to receive a distribution." *Id*.; *see* UPC Rule 11140.

The record date determines to whom the issuer ***sends*** the distribution. The ex-date determines which unitholder is legally ***entitled*** to the distribution, as well as the date when the price of the security is adjusted downward to reflect loss of the right to the distribution:

> The record date is the date on which one must be registered as a shareholder on the stock book of a company in order to ***receive*** a dividend declared by that company. The fact that an individual is the holder of record on the record date, however, does not necessarily mean that such person is

[13] Although strictly speaking only some of these are "FINRA rules," in this Memorandum Opinion the term will be applied to all the above-listed securities rules and regulations.

> ***entitled*** to retain the dividend. ***In terms of entitlement, the ex-dividend date is the dividing line.... When stock is sold prior to the ex-dividend date, the right to a dividend goes with the stock to the purchaser, rather than staying with the seller***.... Generally the ex-dividend date precedes the record date, and the stockholder entitled to the dividend is the individual to whom the dividend is sent.

In re THCR/LP Corp., 2006 WL 530148, at *6 (emphasis added) (quoting *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 861 (11th Cir.1984)). If the record date precedes the ex-date,[14] and the security is sold during the period between the two, the ***seller*** of the security (who held the security on the record date) will receive the full, unadjusted price for the security, as well as the distribution. The ***purchaser*** of the security – who is the holder on the ex-date – will be legally entitled to the distribution. Under such circumstances, the seller will be obligated to remit the value of the dividend to the buyer. *See* NASD Notice to Members 00-54 (August 2000)[15]; *Silco, Inc. v. United States*, 779 F.2d 282, 284 (5th Cir. 1986) (noting in a taxpayer case involving a cash dividend under New York Stock Exchange rules "[w]hen a stock sales contract is executed after the record

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[14] This occurs when the distribution is 25% or more of the value of the subject security.

[15] Under the subheading "Dividends Or Distributions 25 Percent Or Greater Than Security Value" the NASD Notice states:

> For example, if an issuer has announced August 10 as the record date and August 31 as the payable date, then the ex-date will be September 1, the first business day after the payable date. In this example, September 1 is the day on or after which a buyer would purchase the security without the dividend and, therefore, the day on which the price of the stock is adjusted downward. In this example, ***a seller of the security on August 15, even though the holder of record to receive the dividend, would have to relinquish the dividend to the buyer***. Indeed, because the value of the security on August 15 has not yet been adjusted downward to reflect the dividend distribution, the seller in this example would be unjustly enriched by keeping the dividend. The seller would have received the value of the dividend twice: first, as fully reflected in the unadjusted price of the stock on August 15; and secondly, as subsequently paid by the company to record date holders.

NASD Notice to Members 00-54 (emphasis added).

date in these circumstances, the seller, who is the holder of record on the record date, receives the dividend from the corporation but must remit the dividend to the purchaser. The seller does this by executing a due-bill to the buyer at the time of sale and then transferring funds to satisfy that due-bill.").[16]

The Plan's and the UPC 11140's respective allocations[17] will coincide or differ depending on the size of the distribution. If the distribution is small, that is, less than 25% of the value of the subject security, the allocations will be the same. The Plan allocates all distributions according to the Unitholder Distribution Record Date, which must be "at least 21 days prior to a contemplated Unitholder Distribution," i.e., the "payable date." Plan § 6.2. Under UPC 11140(b)(1), which applies to distributions less than 25% of the value of the subject security, "the date designated as the ex-date shall be the second business day preceding the record date." NASD Notice to Members 00-54

[16] *See also Drexel Burnham Lambert, Inc. v. Chapman*, 174 Ga. App. 336, 339 (1985)(noting in a stock dividend case under NASD rules that "[t]he record date establishes only to whom the certificates are sent. The ex-dividend date, when the effect of the issuance . . . is recognized and acknowledged on the market, is the date when ownership of the additional shares is determined."); *Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 732 F.2d 859, 861 (11th Cir. 1984) (affirming the district court holding that Limbaugh, who received the distribution from the issuer because he was the holder on the record date, "was indeed indebted to" broker Merrill Lynch for the distribution because he sold the securities through Merrill Lynch before the ex-date). In other words, even for allocations of large dividends, there is some agreement between the Plan and the FINRA Rules, both allowing the selling shareholder to receive the dividend. The FINRA Rules, however, allocate dividend ***entitlement*** to the purchasing shareholder, while the Plan does not. Thus, Plaintiffs may be able to seek relief from the Selling Unitholders; this issue is not before the Court, however.

[17] "Allocation" is here used to mean either the sending of the distribution to the unitholder under the Plan, or the designation of entitlement to the distribution under FINRA Rules.

(August 2000). As the processing of a security sale takes three business days (Compl. ¶ 32), for small distributions the Plan and the UPC will select the same unitholder.[18]

In contrast, if the distribution is large, that is, 25% or greater of the value of the subject security, the respective allocations under the Plan and UPC 11140 will differ. As the Plan makes no distinction as to size of distribution, its allocation will remain unchanged. Under UPC 11140(b)(2), which governs large distributions, "the ex-date shall be the first business day following the payable date." In other words, the Plan requires the record date (which determines the distribution recipient) to occur at least 21 days prior to the payable date, while UPC 11140 requires the ex-date (which determines who is entitled to the distribution) to occur the day after the payable date.

Also in regard to notification requirements, the Plan and the FINRA Rules differ. The Plan and Orders make no mention of any obligations to notify regulatory authorities, or to otherwise observe any authority beyond the CCAA and the Plan. Plan § 6.2; Sanction Order ¶ 34. Indeed, the Sanction Order explicitly leaves adherence to such outside authority to the Monitor's discretion and releases Defendants and the Monitor from liability for disregarding such authority. Sanction Order ¶¶ 34, 40. The FINRA Rules, on the other hand, require that the issuer notify FINRA ten days prior to the record

[18] For example, if the issuer announces Thursday, December 18, as the record date, all holders as of Monday, December 15, will still be holders on Thursday and thus will be sent the distribution. Under UPC 11140, the ex-date (i.e., the date on which no dividend will come with the security) will be Tuesday, December 16, two business days prior to the announced record date. Thus, a buyer of the security on Tuesday, December 16, will not receive a distribution under the Plan (because his ownership will not take effect until Friday, December 19) nor under UPC 11140 (because he purchased the security on the ex-date). Note that in the above scenario, the "payable date," is largely irrelevant, as long as it falls at least 21 days after the record date under the Plan.

date, and "further advise FINRA of, *inter alia*, the date and amount of the dividend payment, and obtain FINRA's approval." Rule 10b-17; Rule 6490; Compl. ¶ 69.

E. Discharge and Release Provisions in the Plan and Orders

The Plan and Orders contain provisions that release Defendants from liability for any actions or omissions related to, arising out of, or connected to the Plan (collectively, the "Releases," as referred to in the Introduction, *supra*). The Plan's release provision provides:

> ***On the Plan Implementation Date*** and in accordance with the sequential steps and transactions set out in Section 8.3 of the Consolidated CCAA Plan, ***the Arctic Glacier Parties***, the Monitor, Alvarez and Marsal Canada Inc. and its affiliates, the CPS, ***the Trustees, the Directors and the Officers***, ***each and every present and former employee*** who filed or could have filed an indemnity claim or a DO&T Indemnity Claim against the Arctic Glacier Parties ***. . . and any Person claiming to be liable derivatively through any or all of the foregoing Persons (the "Releasees") shall be released and discharged*** from any and all demands, claims, actions, causes of action, counterclaims, suits, . . . and other recoveries on account of ***any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert***, . . . whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, ***existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence*** existing or taking place on or prior to the later of the Plan Implementation Date[19] and the date on which actions are taken to implement the Consolidated CCAA Plan ***that are in any way related to, or arising out of or in connection with the Claims, the Arctic Glacier Parties' business and affairs whenever or however conducted, the Consolidated CCAA Plan, the CCAA Proceedings***, any Claim that has been barred or extinguished pursuant to the Claims Procedure Order or the Claims Officer Order . . . ***and all claims arising out of such actions or omissions shall be forever waived and released . . . all to the full extent permitted by applicable law***,[20] provided that ***nothing in the Consolidated CCAA Plan shall release***

[19] January 22, 2015.

[20] The Plan defines "Applicable Law" as:
any law, statute, regulation, code, ordinance, principle of common law or equity, municipal by-law, treaty, or order, domestic or foreign . . . having the force of law,

> ***or discharge a Releasee from any obligation created by or existing under the Consolidated CCAA Plan or any related document***.

Plan § 9.1 Consolidated CCAA Plan Releases (emphasis added). Note that the Plan's release is effective as of the Plan Implementation Date (January 22, 2015[21]), and it does not apply to obligations imposed by the Plan or Orders.

The Sanction Order contains several provisions that release Defendants from liability. The following provision, for example, sanctions and approves the release in the Plan:

> THIS COURT ORDERS AND DECLARES that the ***Plan*** (including without limitation, the transactions, arrangements, reorganizations, assignments, cancellations, compromises, settlements, extinguishments, discharges, injunctions and ***releases set out therein***) ***is hereby sanctioned and approved pursuant to the CCAA***.

Sanction Order ¶ 9 (emphasis added). Similarly, paragraph 28 expressly approves all of the Plan's releases:

> THIS COURT ORDERS AND DECLARES that the releases contemplated by the Plan are approved.

Sanction Order ¶ 28. Paragraph 11 gives effect to any release and discharge in the Plan:

> THIS COURT ORDERS that ***at the Effective Time*** [i.e., 12:01 a.m. on the Plan Implementation Date of January 22, 2015],[22] the Plan and all associated steps, compromises, settlements, injunctions, releases, reorganizations and

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> of any Government Authority having or purporting to have authority over that Person, property, transaction, event or other matter and regarded by such Government Authority as requiring compliance.

Plan § 1.1 Definitions.

[21] Compl. ¶¶ 39, 45 (noting that the "Plan Implementation Date" is January 22, 2015).

[22] Sanction Order ¶ 1. Definitions ("THIS COURT ORDERS that any capitalized terms not otherwise defined in this Sanction Order shall have the meanings ascribed to them in the Plan."). See also Plan § 1.1 Definitions (defining "Effective Time" and "Plan Implementation Date"); Compl. ¶¶ 39, 45 (noting that the "Plan Implementation Date" is January 22, 2015).

> discharges effected thereby shall be, and are hereby deemed to be: (a) implemented, in accordance with the provisions in the Plan.

Sanction Order ¶ 11 (emphasis added).

The following provision in the Sanction Order provides a broad release, but also does not specifically cover the Individual Defendants:

> THIS COURT ORDERS that none of the Arctic Glacier Parties, the Monitor and/or the CPS shall incur any liability as a result of acting in accordance with the terms of the Plan or this Sanction Order, ***save and except for any gross negligence or wilful misconduct on their parts***.

Sanction Order ¶ 14 (emphasis added). Another provision provides a broad release applicable to all Defendants. It specifically approves any steps and actions taken by Defendants that are related to distributions:

> THIS COURT ORDERS that the Monitor, the Transfer Agent ***and any other Person*** required to make any distributions, payments, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan ***are hereby authorized and directed to complete such distributions***, payments, deliveries or allocations and to take any such related steps or actions, as the case may be, in accordance with the terms of the Plan, ***and such distributions, payments, deliveries and allocations, and the steps and actions related thereto, are hereby approved***.

Sanction Order ¶ 16 (emphasis added).

Paragraph 19 of the Sanction Order deems that each unitholder consented and agreed to all of the provisions of the Plan in their entirety, and if there is any conflict between the Plan and the provisions of any other agreement, the Plan takes precedence and priority:

> THIS COURT ORDERS that, ***as of the Plan Implementation Date*** [i.e., January 22, 2015[23]], each Affected Creditor and Unitholder shall be deemed

[23] Compl. ¶¶ 39, 45 (noting that the "Plan Implementation Date" is January 22, 2015).

> to have consented and agreed to all of the provisions of the Plan in their entirety, and, in particular, each affected Creditor and Unitholder shall be deemed: (a) to have granted, executed and delivered to the Monitor and the Arctic Glacier Parties all documents, consents, releases, assignments, waivers or agreements, statutory or otherwise, required to implement and carry out the Plan in its entirety; and (b) to have agreed that if there is any conflict between the provisions of the Plan and the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor or Unitholder and the Arctic Glacier Parties as of the Plan Implementation Date, the provisions of the plan take precedence and priority, and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

Sanction Order ¶ 19 (emphasis added). The following provision applies to all "Releas***ees***," which as defined in § 9.1 of the Plan includes all Defendants:

> THIS COURT ORDERS that all Persons shall be permanently and forever barred, estopped, stayed and enjoined, ***from and after the Effective Time*** [i.e., 12:01 a.m. on the Plan Implementation Date of January 22, 2015],[24] in respect of ***any and all Releases***, from: (i) commencing, conducting or continuing in any manner, directly or indirectly, ***any action, suits, demands or other proceedings of any nature or kind whatsoever*** (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) ***against the Releasees*** . . . (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suit or demand, including without limitation by way of contribution or indemnity or other relief, in common law or in equity, for breach of trust or breach of fiduciary duty, under the provisions of any statute or regulation, or other proceedings or any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Releases . . . (v) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

[24] Plan § 1.1 Definitions (defining "Effective Time" and "Plan Implementation Date"); Compl. ¶¶ 39, 45 (noting that the "Plan Implementation Date" is January 22, 2015).

Sanction Order ¶ 29. Finally, the following provision covers all Defendants in regard to distributions:

> THIS COURT ORDERS that none of the Monitor, the CPS, the Trustees, the Arctic Glacier Parties, or ***any individuals related thereto*** shall incur any liability as a result of ***payments and distributions to Unitholders***, in each case on behalf of AGIF, once such distribution or payment has been made by the Monitor to, and confirmation of receipt has been received by the Monitor from, the Transfer Agent.

Sanction Order ¶ 40 (emphasis added).

In its Recognition Order, the Court gave all of the Sanction Order's release provisions "full force and effect in the United States." Recognition Order ¶ 2. The following release in the Recognition Order is broad, and it applies to all Defendants:

> On the ***Plan Implementation Date*** [i.e., January 22, 2015[25]] and in accordance with the sequential steps and transactions set out in Section 8.3 of the CCAA Plan, ***the Debtors,*** the Monitor, Alvarez and Marsal Canada Inc. and its affiliates, the CPS, ***the Trustees, the Directors and the Officers,*** each and every present and former employee who filed or could have filed an indemnity claim or a DO&T Indemnity Claim against the Debtors, . . . and any Person claiming to be liable derivatively through any or all of the foregoing Persons ***(the "Releasees") shall be released and discharged from any and all demands, claims*** . . . including for injunctive relief or specific performance and compliance orders, expenses, executions and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, whether statutory or otherwise arising, including any and all claims in respect of the payment and receipt of proceeds and statutory liabilities of any of the Trustees, ***Directors, Officers and employees of the Debtors*** and any alleged fiduciary or other duty (whether acting as a Trustee, ***Director, Officer, member or employee or acting in any other capacity in connection with the Debtors' business or an individual Debtor***), whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior

[25] Compl. ¶¶ 39, 45 (noting that the "Plan Implementation Date" is January 22, 2015).

> to the later of the Plan Implementation Date and the date on which actions are taken to implement the CCAA Plan that are in any way related to, arising out of or in connection with the Claims, the Debtors' business and affairs whenever or however conducted, the Plan, the Canadian Proceedings and the Chapter 15 Cases . . . and all claims arising out of such actions or omissions shall be forever waived, discharged and released . . . ***all to the full extent permitted by applicable law***, provided that nothing in the Plan shall release or discharge a Releasee from any obligation created by or existing under the Plan or any related document.

Recognition Order ¶ 5 (emphasis added). In contrast, the following provision, though broad, does not specifically apply to the Individual Defendants:

> Neither the Debtors nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Recognition Order.

Recognition Order ¶ 9.

F. Plaintiffs Purchase AGIF Units

On November 18, 2014, the Monitor issued a report[26] disclosing an "Estimated Unitholders' Distributed Cash on the Plan Implementation Date" of approximately USD $0.153 per share. Compl. ¶ 30. The report predicted a Plan Implementation Date around January 8, 2015. *Id*. AGIF published legal notices on December 11, 2014, in the *Wall Street Journal*, the *Winnipeg Free Press*, and the *Globe & Mail*, announcing that the Unitholder Distribution Record Date would be December 18, 2014. Ramos Dec., Ex. F (Legal Notice, Arctic Glacier Income Fund Notice of Unitholder Distribution Record Date, *Wall Street Journal*, Dec. 11, 2014, at B6), Ex. G (Legal Notice, Arctic Glacier Income Fund Notice of Unitholder Distribution Record Date, *Winnipeg Free Press*, Dec. 11, 2014, at B4), Ex. H

[26] The Monitor issued periodic reports for purposes of public disclosure regarding AGIF. Compl. ¶ 29.

(Legal Notice, Arctic Glacier Income Fund Notice of Unitholder Distribution Record Date, *Globe & Mail*, Dec. 11, 2014, at B3). Four days later, on December 15, AGIF issued a press release posted to the CSE, announcing that "unitholders of the Fund as of December 18, 2014 will be entitled to receive the initial distribution from the Fund pursuant to the [Plan]," but adding that the distribution amount had not yet been established. Compl. ¶ 31; December 15, 2014 Press Release. AGIF posted the press release, as well as a Material Change Report, on SEDAR, the electronic filing system for the disclosure documents of public companies and investment funds across Canada. Motion ¶ 12, n. 7; Ramos Dec., Ex. J (Material Change Report, Arctic Glacier Income Fund, December 15, 2014 ("Material Change Report").

The Material Change Report explained:

> Arctic Glacier Income Fund (the "Fund") announced on December 11, 2014 that unitholders of the Fund as of December 18, 2014 will be entitled to receive the initial distribution from the Fund pursuant to the Plan of Compromise or Arrangement . . . approved by the unitholders on August 11, 2014 (the "Plan"). The date and value of this distribution will be announced by way of a press release once such information is determined.

Material Change Report. Due to the three day processing period for securities sales, only purchasers on or before December 15, 2014, would have been registered unitholders as of the December 18 record date. Compl. ¶ 32.

AGIF did not notify FINRA of its planned dividend or the December 18 record date. Compl. ¶ 31. As a result, FINRA did not set an ex-date for AGIF units. Compl. ¶¶ 33-34. According to Defendants, the Complaint does not allege that Plaintiffs were unaware of AGIF's public disclosures. Motion ¶ 5.

Starting on December 16, 2014, Plaintiffs began purchasing AGIF units on the OTC from unitholders ("Selling Unitholders") who had acquired their shares prior to confirmation of the Plan. Compl. ¶ 50; Reply ¶¶ 18-19. Plaintiffs continued to purchase units up to and including January 22, 2015. Compl. ¶¶ 50, 53, 55.

On January 9, 2015, another press release announced that AGIF would implement the Plan as soon as possible. Motion ¶ 15; Ramos Dec., Ex. K (Press Release, Arctic Glacier Income Fund Provides Update on Plan Implementation, January 9, 2015 ("January 9, 2015 Press Release")). The January 9, 2015 Press Release stated:

> As previously announced by the Fund on December 15, 2014, the date and value of the initial distribution to unitholders of the Fund, as contemplated in the Plan, will be announced by way of a press release once such information is determined.

January 9, 2015 Press Release.

AGIF issued yet another press release on January 21, 2015, disclosing that the Plan Implementation Date would be the next day, January 22, 2015, and that "unitholders of the Fund as of December 18, 2014 (the 'Record Date') were entitled to receive an initial distribution from the Fund pursuant to the Plan of $0.155570 USD per unit of the Fund held on the Record Date." Motion ¶ 16; Ramos Dec., Ex. L (Press Release, Arctic Glacier Income Fund Announces Distribution to Unitholders, January 21, 2015 ("January 21, 2015 Press Release")).

On January 22, 2015, AGIF distributed through a transfer agent $0.155570 USD per unit[27] to the unitholders of record as of the December 18, 2014 Unitholder Distribution

[27] At this time AGIF units were trading at approximately $0.20 per unit. Compl. ¶ 40.

Record Date. Compl. ¶¶ 39-40. AGIF did not notify FINRA of the January 22 payable date. Compl. ¶ 39. Given the three day processing delay, Plaintiffs allege that the de facto and unofficial ex-date for the dividend was December 16, 2014, the day after the last day on which a holder would have had to purchase units in order to receive the dividend. Compl. ¶¶ 32-34, 41-42. As Plaintiffs began purchasing units on December 16, 2014, they did not receive the dividend. Compl. ¶¶ 47, 49, 50.

On January 23, 2015, the Investment Industry Regulatory Organization of Canada ("IIROC") imposed a "trading halt" on AGIF units trading on the CSE, listing the reason for the halt as "Pending Company Contact." Motion ¶ 17; Ramos Dec., Ex. M (IIROC Trading Halt – AG.UN, January 23, 2015). Minutes after IIROC's halt began, FINRA halted trading of AGIF units on the OTC, citing Halt Code "U1," which refers to "Foreign Markt/Regulatory Halt." Motion ¶ 17; Ramos Dec., Ex. O (FINRA Over-the-Counter-Equities Trading Halts, January 23, 2015); FINRA, Trading Halts: Halt Code, *available at* http://otce.finra.org/TradeHaltsCurrent. IIROC and FINRA lifted their respective trading halts on January 28, 2015. Compl. ¶ 44; Motion ¶ 17; Ramos Dec., Ex. P (IIROC Trade Resumption – AG.UN, January 28, 2015). In the days following resumption of trading on January 29, 2015, the average unit price decreased by 75%, from a closing price of approximately $0.21 per unit on January 22, 2015, to $0.05 per unit. Compl. ¶ 45. The decrease in unit price reflected the loss of the right to a dividend. Compl. ¶ 45.

G. Plaintiffs Allege Defendants Decided Not to Take Corrective Action

Plaintiffs allege that Individual Defendant Adams, AGIF's Secretary, admitted to Plaintiff Eldar Brodski Zardinovsky in a telephone conversation on or about March 5,

2015, that "he had observed after the issuance of the [December 15, 2014] Press Release that there was no change in the market price of AGIF units," that the Press Release "should have caused the share price to have fallen by 75% on December 16, 2014, the first day units supposedly began to trade without the right to receive the dividend," and "that despite this awareness that AGIF units were trading at an unjustified several hundred percent premium, Defendants affirmatively decided not to take any corrective action to ensure that current or potential shareholders had the information contained in the Press Release . . . ." Compl. ¶¶ 77-78.

H. Plaintiffs' Claims

Plaintiffs assert that Defendants [1] "may pay dividends only with the approval of [FINRA] . . . and [2] then only to holders of the securities that FINRA recognizes as having a right to receive the dividend in accordance with FINRA's rules." Compl. ¶ 1. According to Plaintiffs, under UPC 11140(b)(2) they were entitled to the dividend because they held units on the payable date (January 22, 2015), the day before the ex-date. Compl. ¶ 52. "[I]nstead of paying Plaintiffs the almost $2 million in dividends they were entitled to receive, [Defendants] paid the dividends to the parties who sold the units of AGIF to Plaintiffs." Compl. ¶ 1.

Furthermore, Plaintiffs allege that "Defendants violated securities rules and regulations by failing to disclose material information relating to AGIF's decision to pay dividends that caused the price of AGIF units to be wrongfully inflated by approximately 75% . . . resulting in steep losses to Plaintiffs." Compl. ¶ 2.

In short, Plaintiffs argue that Defendants failed to meet their obligations under FINRA Rules. As a result, Defendants are allegedly liable for (1) negligence for breaching their duty to Plaintiffs under the FINRA Rules to pay dividends to them; and (2) negligence for breaching their duty to Plaintiffs "to comply with all relevant statutes, rules, regulations, authorities and agreements concerning the establishment of the ex-date in connection with its January 2015 dividend payment." Compl. ¶¶ 85, 86, 89. The Individual Defendants are allegedly liable for breach of fiduciary duty owed to Plaintiffs "to ensure that dividend payments intended for unitholders were paid to Plaintiffs" as required by the FINRA Rules. *See* Compl. ¶ 93.

Defendant AGIF is allegedly liable for negligent misrepresentation for breaching its "duty to disclose material information related to AGIF's January 2015 dividend payment," including (1) that it would disregard the FINRA Rules, (2) that it would "unilaterally establish the ex-date without the review and approval of a regulator or exchange," and (3) "the trading price of AGIF's stock had not appropriately adjusted downward to reflect" AGIF's decision to announce a record date but not an ex-date under the FINRA Rules. Compl. ¶¶ 97-98; Opp. ¶¶ 96-98.

The Complaint also contains allegations that Defendant AGIF is liable for violation of § 10(b) of the 1934 Act and Rule 10b-5 for failing to disclose material facts regarding its disregard of FINRA Rules, its unilateral and unapproved establishment of the ex-date, and the alleged failure of AGIF stock to appropriately adjust downward after the Unitholder Distribution Record Date had passed. Compl. ¶¶ 104-107. Furthermore, the Complaint alleges common law fraud for failure to comply with the FINRA Rules and

for failure to fully disclose the same material information mentioned above in regard to the claims for negligent misrepresentation and violation of § 10(b) and Rule 10b-5. Compl. ¶¶ 98, 114-116. Plaintiffs seek compensatory damages on all counts, reasonable attorneys' fees and costs, prejudgment interest, punitive damages, and treble damages, and a distribution pursuant to the Plan. Compl. ¶ 24.

Plaintiffs maintain that Defendants' obligations under the FINRA Rules constituted "concurrent and additional obligations under U.S. law that did not conflict in any respect with the Plan or Recognition Order." Opp. ¶¶ 51, 56, 61-62. Thus, Plaintiffs say that they are ***not*** suing for the distributions that the Defendants actually made to the Selling Unitholders, but rather are suing for Defendants' failure to make distributions to the Plaintiffs as well as Defendants' failure to disclose to Plaintiffs material facts regarding AGIF's distribution procedure. Opp. ¶¶ 38, 61. Plaintiffs argue that the Releases apply only to Defendants' distributions to the Selling Unitholders, but do ***not*** apply to Defendants' failure to meet their "concurrent and additional obligations" to Plaintiffs under the FINRA Rules. Opp. ¶ 61.

LEGAL STANDARD

Defendants have filed the Motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6), applicable to this adversary proceeding through Fed. R. Bank. P. 7012(b).[28] Under Rule 12(b)(6), the Court must accept as true all material allegations of the

[28] Defendants have also moved to dismiss Plaintiffs' misrepresentation claim for lack of standing under Fed. R. Civ. P. 12(b)(1). As the Court is dismissing Plaintiffs' Complaint in its entirety for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and Fed. R. Bank. P. 7012(b), the Court finds it unnecessary to address Defendants' lack of standing defense.

complaint. *Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir.2004). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir.1997) (internal quotation marks omitted). The Court may grant such a motion to dismiss only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *Maio v. Aetna, Inc.*, 221 F.3d 472, 481–82 (3d Cir.2000) (internal quotation marks omitted).

To withstand a motion to dismiss under Rule 12(b)(6), "a civil plaintiff must allege facts that 'raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).' " *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir.2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While heightened fact pleading is not required, "enough facts to state a claim to relief that is plausible on its face" must be alleged. *Twombly*, 550 U.S. at 570. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Warren Gen. Hasp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011). The Court is not obligated to accept as true "bald assertions," *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir.1997) (internal quotation marks omitted), "unsupported conclusions and unwarranted inferences," *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir.1997), or allegations that are "self-evidently false," *Nami v. Fauver*, 82 F.3d 63, 69 (3d Cir.1996).

DISCUSSION

Defendants contend that the Releases insulate them from liability. Moreover, they argue that under the doctrine of *res judicata* they were only obligated to make distributions pursuant to the Plan, not U.S. securities law, and therefore they violated no law when paying dividends.

Plaintiffs bring the following challenges to Defendants' arguments: (1) beyond the obligations of the Plan, the FINRA Rules impose "concurrent and additional obligations" on Defendants that they failed to meet; (2) the Releases apply only to Defendants' distributions to the Selling Shareholders, not the required distributions to Plaintiffs that Defendants failed to make; (3) the distribution procedure Defendants followed and the Releases violate Plaintiffs' rights under the Due Process Clause of the U.S. Constitution; and (4) the Releases are ineffective as to the Individual Defendants. This Memorandum Opinion will first discuss the Plan's preclusive effect under *res judicata*; it will then address each of Plaintiffs' challenges, as well as the applicability of the Releases to Plaintiffs' fraud claims.

A. Res Judicata

A confirmed plan[29] is "*res judicata* as to all issues decided or which could have been decided at the hearing on confirmation." *In re Szostek*, 886 F.2d 1405, 1408, 1413 (3d Cir. 1989). Under the doctrine of *res judicata*, a Plan supersedes all applicable law, whether bankruptcy or non-bankruptcy law. *In re Bowen*, 174 B.R. 840, 847 (Bankr. S.D. Ga. 1994)

[29] The Sanction Order approved and sanctioned the Plan. Sanction Order at 1.

("challenges to a confirmed plan of reorganization which allege that the plan is contrary to applicable law, either bankruptcy or otherwise, are bound to be unsuccessful"). "Under section 1144 of the Bankruptcy Code, orders confirming a plan of reorganization can only be revoked ***if the order was procured by fraud***. . . . " *Id*. (emphasis added). "Subject to compliance with the requirements of due process under the Fifth Amendment, a confirmed plan of reorganization is binding upon every entity that holds a claim or interest . . . ." *Id*. at 844 (quoting 5 L. King, Collier on Bankruptcy, ¶ 1141.01, 1141-4 – 1141-9 (15th ed. 1993)).

Here, the Plan's distribution procedure is an adjudication, and to the extent that there is a conflict between that adjudication and the FINRA Rules, the Plan will supersede.[30] *In re Bowen*, 174 B.R. 840, 845 (Bankr. S.D. Ga. 1994). In other words, when faced with conflicting obligations under the Plan and the FINRA Rules, Defendants must follow the former, notwithstanding the latter. *Karathansis v. THCR/LP Corp*., No. CIV. 06-1591(RMB), 2007 WL 1234975, at *6, *8 (D.N.J. Apr. 25, 2007), *aff'd sub nom. In re THCR/LP Corp*., 298 F. App'x 120 (3d Cir. 2008) ("[T]he Debtor was obliged to instruct its disbursing agent to make distributions according to the terms of the Plan . . . Appellants are . . . entitled to the Plan distributions . . . notwithstanding UPC Rule 11140").

[30] Note that during the period between the CCAA Court's confirmation of the Plan (via the Sanction Order on September 5, 2014) and the Plan Implementation Date (January 22, 2015, the date the Plan took effect), the provisions of the Plan, including § 6.2 regarding distributions, governed Debtors' conduct through the Sanction Order and Recognition Order. See Sanction Order ¶ 12; Recognition Order at 2.

B. "Concurrent and Additional Obligations" Under the FINRA Rules

Plaintiffs contend that "[n]othing in the Plan precluded compliance with FINRA rules." Opp. ¶ 5. The Plan "established a general procedure for paying dividends, but omitted details that only could be set by regulators, including the date on which an investor had to own AGIF units to have the right to receive the dividend, and the dividend payment date and amount." Opp. ¶ 10. Plaintiffs maintain that "[t]he Plan does not require payment of the dividend without FINRA approval or in violation of FINRA rules. Defendants easily could have sought FINRA approval and paid the dividend in compliance with FINRA rules." Opp. ¶ 56. "By way of example only, Defendants could have set the payment in a way that would have ensured compliance with FINRA rules and the Plan, in which event [Plaintiffs] would have avoided suffering any damages." Opp. ¶ 56 n. 7.

1. Plaintiffs' Tranches Proposal

Plaintiffs argue that nothing in the Plan says that Defendants had to make a dividend payment which was 25% or greater of the value of the subject security. 4/19/16 Hr. (Gordon). According to Plaintiffs, a dividend payment of 24% of the value of the subject security would have invoked UPC 11140(b)(1), rather than UPC 11140(b)(2). *Id*. Subsection (b)(1) requires that "the date designated as the 'ex-dividend date' shall be the second business day preceding the record date if the record date falls on a business day, or the third business day preceding the record date if the record date falls on a day designated by the Committee as a non-delivery date." UPC 11140(b)(1).

The procedure Defendants followed when announcing and distributing dividends in December 2014 - January 2015 was consistent with UPC 11140(b)(1). On Monday, December 15, 2014, Defendants announced that Thursday, December 18, 2014, would be the Unitholder Distribution Record Date. Given that the OTC sale process takes three days,[31] the de facto ex-date thus became Tuesday, December 16, 2014, i.e., this was the date as of which a new security holder would not be entitled to the dividend. Compl. ¶¶ 32-34, 41-42. UPC 11140 (b)(1) also selects December 16 as the ex-date because it is exactly two days before the December 18 Unitholder Distribution Record Date.

As the actual dividend distribution occurred on January 22, 2015, the procedure followed by AGIF was also consistent with the Plan, which requires that ". . . the Transfer Agent shall distribute each Unitholder Distribution . . . to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date," which "means the date(s) . . . that are . . . at least 21 days prior to a contemplated Unitholder Distribution . . . " Plan §§ 1.1 Definitions, 6.2 Distributions from the Unitholders' Distribution Cash Pool. Thus, there is no conflict between UPC 11140(b)(1) and the Plan; both allocate the distribution to the same Unitholders.

In contrast, if the dividend is 25% or greater of the value of the subject security, UPC 11140(b)(2) applies, requiring that "the ex-dividend date shall be the first business day following the payable date." UPC 11140(b)(2). Thus, for such large dividends the FINRA Rules conflict with the Plan's procedure. Subsection (b)(2) would have required

[31] Compl. ¶ 32.

the ex-date to be January 23, 2015, the day ***after*** the payable date of January 22, 2015. As noted, the Plan specified that the Unitholder Distribution Record Date, and thus the dividing line between recipients and non-recipients of the distribution, occur at least 21 days ***before*** the payable date.

Defendants' dividend amounted to approximately 75% of the value of the subject security. Plaintiffs suggest that Defendants could have accomplished the distribution of this dividend by paying it out in "tranches," for example, each tranche amounting to 24%, 24%, 24% and 3% of the value of the subject security. 4/19/16 Hr. (Gordon). Doing so would have complied with both the Plan and UPC 11140 (b)(1), the applicable subsection for smaller dividends.

The Court, however, finds Plaintiffs' suggestion unacceptable because it places a limitation on the Plan's dividend procedure. The Plan makes no distinction between small and large dividends. Its procedure is clearly intended to apply to any dividend, of whatever size.

Moreover, the Plan is comprehensive as to dividend payments. In section 8.3 and in Schedule "B" the Plan provides a sequence of steps that must begin on the Plan Implementation Date. Nowhere in this sequence is there room for any distribution other than the one presented in section 6.2, which only provides for distributions "to each Registered Unitholder, as of the applicable Unitholder Distribution Record Date[32] . . . ." Plan § 6.2. Pursuant to the Sanction Order, the Monitor is only obligated to follow the

[32] As noted above, the Plan requires that the Unitholder Distribution Record Date be at least 21 days before the payable date.

CCAA, the Plan and Orders. Sanction Order ¶ 34 (the Monitor or CPS "shall be exclusively authorized and empowered to [make distributions], to the exclusion of all other Persons including the Artic Glacier Parties, and without interference from any other Person"). Where the Plan imposes applicable law requirements, it does so explicitly. Plan §§ 6.10(a), 6.10(b), 6.11, 6.13. The Plan does not mention applicable law requirements in section 6.2. Plan § 6.2. Finally, the Plan's release provision, section 9.1, shields Defendants from liability for "any omission, transaction, duty, responsibility, indebtedness, liability, obligation," but includes an exception: "provided that nothing in the Consolidated CCAA Plan shall release or discharge a Releasee from any obligation created by or existing under the Consolidated CCAA Plan or any related document." Plan § 9.1 Consolidated CCAA Plan Releases. In other words, the Plan subjects Defendants to ***its*** obligations, while releasing them from all other obligations.

To impose on the Plan FINRA's distinction between small and large dividends is to conclude that the Plan is not comprehensive as to its distribution procedure, even though it indicates that it is. To do so would limit the Monitor's discretion in making distributions, contrary to the Sanction Order's prohibition of such limitations. Therefore, the Court concludes that Plaintiffs' tranches proposal does not offer a way to harmonize the Plan and the FINRA Rules.[33]

[33] The same analysis, with the same result, can be applied to the other area of conflict between the Plan and the FINRA Rules: the requirement under the FINRA Rules that the issuer must, among other things, notify FINRA of the planned dividend payment ten days before the record date, and obtain FINRA's approval.

2. Plaintiffs' Proposal that Defendants Pay Twice

Plaintiffs make yet another proposal for eliminating conflict between the Plan and the FINRA Rules. They maintain that Defendants could have paid dividends under both the Plan and the FINRA Rules, even if in doing so Defendants would pay some dividends twice, once to the Selling Unitholders and once to Plaintiffs. Opp. ¶¶ 57-60. Plaintiffs maintain that this is the solution used by the court in *Karathansis*, 2007 WL 1234975.

In *Karathansis* the District Court reviewed the Bankruptcy Court's holding that the FINRA Rules[34] trumped the reorganization plan and therefore the dividend should go to the purchasing shareholders. *Karathansis*, 2007 WL 1234975, at *1. The District Court overturned the Bankruptcy Court in part, holding that (1) the FINRA Rules did not supersede the plan, and (2) the plan allocated the dividend to the selling shareholders and thus the selling shareholders should be paid the dividend. *Id*. at *9.

The holding did not say that the debtor was obligated to follow the FINRA Rules. Rather, it said that the plan and the FINRA Rules could be harmonized if two conditions were present: (1) the selling shareholders receive a "double dip" payment (i.e., receive the value of the distribution twice) ***and*** (2) the debtor pays twice. *Id*. at *8-9. Both these conditions presented issues that the court explicitly did not address: (1) the possible unjust enrichment of the selling shareholders (this issue was remanded to the Bankruptcy Court for further proceedings), and (2) "the Debtor ***may*** have to pay twice," an issue that "is not presently before it." *Id*. at *9 (emphasis added). The District Court did ***not*** hold

[34] The same FINRA Rules were at issue in *Karathansis* as in the instant case.

that the debtor should have paid twice; rather, it recognized that the debtor ***may*** have to pay twice because it had already paid the purchasing shareholders under the Bankruptcy Court's erroneous ruling, and now had to pay the selling shareholders under the District Court's holding.

In the instant case, paying twice would violate the Plan and Orders. In breach of the Sanction Order, it would impose an obligation on the Monitor that the Monitor did not choose. *See* Sanction Order ¶ 34. It would constitute an additional step in the Plan's distribution procedure, something the Plan does not allow. *See* Plan § 8.3 and Schedule "B." Therefore, Plaintiffs' proposal that Defendants pay twice fails as a method of harmonizing the Plan and the FINRA Rules.

Rather than "concurrent and additional obligations, the Court finds that Defendants have conflicting obligations under the Plan and the FINRA Rules. Thus, absent the Plan being procured by fraud, or Plaintiffs establishing a Due Process violation,[35] the doctrine of *res judicata* will bar Plaintiffs from now contesting the Plan's distribution procedure, even if only to argue that the procedure omits important steps that Defendants should have been required to take. *See* Compl. ¶ 28. Defendants were obligated to follow the Plan's distribution procedure and eschew any conflicting procedure, such as that provided in the FINRA Rules. Therefore, Plaintiffs have failed adequately to allege that Defendants were obligated to follow the FINRA Rules and that Defendants are liable for Plaintiffs' losses.

[35] *See In re Bowen*, 174 B.R. at 844, 848.

Although the preclusive effect of *res judicata* in regard to the Plan's distribution procedure is a sufficient ground for the Court to grant the Motion, the Releases provide a second ground.

C. Applicability of Releases to Defendants' Omission of Payments to Plaintiffs

Plaintiffs apply their "concurrent and additional obligations" argument to Defendants' Releases defense. Compl. ¶ 51. Plaintiffs assert that the release in paragraph 9 of the Recognition Order, which states that AGIF shall not "incur any liability as a result of acting in accordance with the terms of the Plan and this Sanction Recognition Order," is inapplicable to their claims because,

> [Plaintiffs] do not seek to hold Defendants liable because of any acts ***in accordance with*** the Plan and Recognition Order. Rather . . . liability is predicated on Defendants' disregard of its concurrent and additional obligations under U.S. law that did not conflict in any respect with the Plan or Recognition Order.

Opp. ¶ 51 (emphasis in original). Leaving aside that Plaintiffs' "concurrent and additional obligations" argument is unpersuasive (*see supra*), Plaintiffs get little mileage from the argument in the context of the Releases. The Releases are sufficiently broad to cover Plaintiffs' claims.

The Releases took effect on the Plan Implementation Date of January 22, 2015. Plan § 9.1; Sanction Order ¶¶ 11, 19, 29; Recognition Order ¶ 5. By their terms, the Releases cover the period during which the alleged acts of misconduct occurred (December 2014 and January 2015 up to and including January 22, 2015, when Defendants made the distribution in question).

Furthermore, the Releases prohibit all claims against Defendants "***in any way related to, or arising out of or in connection with*** the Claims, the Arctic Glacier Parties' business and affairs whenever or however conducted, the Consolidated CCAA Plan, the CCAA Proceedings . . . ." Plan § 9.1 (emphasis added); *see also* Recognition Order ¶ 5; Sanction Order ¶ 40 ("THIS COURT ORDERS that none of the Monitor, the CPS, the Trustees, the Arctic Glacier Parties, or any individual related thereto shall incur any liability as a result of payments and distributions to Unitholders . . ."). In a bankruptcy release, the phrase "in relation to" is expansive. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 138 (2009). Here, Plaintiffs' claims are predicated on not having received distributions. The claims clearly relate to, arise out of, or are in connection with the Plan's distribution procedure, whether the procedure as implemented involved actions taken for the benefit of the Selling Unitholders, or omissions of actions that would have benefited Plaintiffs. *See* Plan § 9.1 (stating "claims arising out of such actions or ***omissions*** shall be forever waived and released" (emphasis added)).

D. Plaintiffs' Due Process Rights

Plaintiffs maintain that the Releases extend only "to the full extent permitted by applicable law . . ." Plan § 9.1 Consolidated CCAA Plan Releases; *see also* Recognition Order ¶ 5. The Plan and Recognition Order include the phrase "to the full extent permitted by applicable law" because there are limits to the types of claims from which Defendants can be shielded by a release. For example, a Release will be ineffective if Plaintiffs' Due Process rights were violated in the confirmation of the Plan. *In re Bowen*,

174 B.R. at 844. The only relevant law that Plaintiffs proffer as being beyond the reach of the Releases is the Due Process Clause of the U.S. Constitution.[36] Opp. ¶ 45.

Plaintiffs allege that "pursuant to the Due Process Clause . . . releases and/or discharges of claims in bankruptcy are unenforceable where, as here, the claim arose after the date of the discharge or release and the plaintiffs' interests were not represented in the underlying bankruptcy proceeding." Opp. ¶ 41. Plaintiffs argue that despite the Plan Implementation Date of January 22, 2015, the true discharge or release date occurred when the Plan and Orders were signed in August and September 2014, several months before a connection arose between Plaintiffs and Defendants. Opp. ¶ 44. Thus, the Releases cannot insulate Defendants from liability for any conduct occurring after the signing dates of the Plan and Orders. Opp. ¶¶ 40, 42, 44.

In support, Plaintiffs cite *Jones v. Chemetron Corp.*, where "a plaintiff who was not yet born as of the date of a discharge in bankruptcy asserted personal injury claims based on his mother's exposure to toxic chemicals." 212 F.3d 199 (3d Cir. 2000); Opp. ¶ 48. The Third Circuit held that the plaintiff could pursue his personal injury claims because:

> [he] had no notice of or participation in the Chemetron reorganization plan. No effort was made during the course of the bankruptcy proceeding to have a representative appointed to receive notice for and represent the interests of future claimants. Therefore, whatever claim [plaintiff] Ivan Schaffer may now have was not subject to the bankruptcy court's bar date order and was not discharged by that court's confirmation order.

Chemetron, 212 F.3d at 210 (citation omitted); Opp. ¶ 48.

[36] Plaintiffs' Due Process argument also applies to the preclusive effect of *res judicata* in regard to the Plan's distribution procedure, discussed *supra*.

Chemetron is distinguishable from the instant case. Unlike the *Chemetron* plaintiff, who was not yet born at the time of the bankruptcy discharge, Plaintiffs here purchased units from the Selling Unitholders, who were either themselves appropriately noticed of the Plan and the release it contained, or were the "successors and assigns" of unitholders who participated in the bankruptcy proceeding. Reply ¶¶ 18, 19.[37] The Plan was binding not only on the voting unitholders but also on their "successors and assigns." Plan § 1.3. "An assignee stands in the shoes of the assignor and subject to all equities against the assignor." *Goldie v. Cox*, 130 F.2d 695, 720 (8th Cir. 1942) (citations omitted); *see also In re NationsRent, Inc.*, 381 B.R. 83, 95 (Bankr. D. Del. 2008) ("It is black-letter law that as assignee of Lenders' rights, the Assigned Claimant, became a general, non-priority, unsecured claimant and nothing more . . . . [and] is not entitled to more than the rights Lenders had to assign.")

In sustaining the trustee's claim objection, the Bankruptcy Court in *In re KB Toys, Inc.* held that "a claim in the hands of a transferee has the same rights and disabilities as

[37] Debtors' creditors and unitholders accepted the Plan, with over 65% of unitholders participating in the vote, and 99.81% of the voting unitholders approving the Plan. Ramos Dec., Ex. C (Monitor's Certificate (Re. Plan Implementation Date), *In re Arctic Glacier International In., et al.*, No. CI 12-01-76323 (Can. M.Q.B. Jan. 22, 2015)), Ex. D (Seventeenth Report of the Monitor Alvarez & Marsal Canada Inc., *In re Arctic Glacier International Inc., et al.*, No. CI 12-01-76323 (Can. M.Q.B. Aug. 26, 2014) §§ 4.19-.20, Appx. H).

The CCAA Court ordered and declared that "there has been good and sufficient service and delivery of the Meeting Order [regarding approval and sanctioning of the Plan] and the documents referred to in the Meeting Order, including the Notice to Affected Creditors and Notice to Unitholders." Sanction Order ¶ 3. Moreover, each unitholder was "deemed to have consented and agreed to all of the provisions of the Plan in their entirety." Sanction Order ¶ 19; *see also* Plan § 11.1(e)("each Unitholder will be deemed to have consented and agreed to all of the provisions of the Consolidated CCAA Plan, in its entirety . . .").

Finally, the Complaint does not allege that the Selling Unitholders were without notice.

the claim had in the hands of the original claimant." 470 B.R. 331, 343 (Bankr. D. Del. 2012), *aff'd sub nom. In re KB Toys Inc.*, 736 F.3d 247 (3d Cir. 2013). The court explained:

> I conclude that a trade claim purchaser holds that claim subject to the same rights and disabilities under Bankruptcy Code § 502(d) as does the original trade claimant . . . . . [since a] purchaser of claims in a bankruptcy is well aware (or should be aware) that it is entering an arena in which claims are allowed and disallowed in accordance with the provisions of the Bankruptcy Code and the decisional law interpreting those provisions. Under such conditions, a claims purchaser is not entitled to the protections of a good faith purchaser.

Id. Here, Plaintiffs were well aware (or should have been aware) that they were entering a risky investment arena with lower disclosure requirements. Plaintiffs purchased their units on the OTC "Pink" market, the website of which includes the following description and warning:

> With no minimum financial standards, this market includes foreign companies that limit distribution of their disclosure to their home market, penny stocks and shells, as well as distressed, delinquent, and dark companies not able or willing to provide adequate information to investors. Pink requires the least in terms of company disclosure and the most in terms of investor research and caution.

Available at http://www.otcmarkets.com/marketplaces/otc-pink (emphasis added); Motion ¶ 87. Thus, Plaintiffs have the same rights and disabilities as their predecessor unitholders. As the predecessor unitholders had notice of the Plan and Orders when they were signed, Plaintiffs had sufficient notice and thus their Due Process challenge premised on *Chemetron* fails.[38]

[38] Plaintiffs also cite *Morgan Olson L.L.C. v. Frederico*, 467 B.R. 694 (S.D.N.Y. 2012) and *In re Chance Indus.*, 367 B.R. 689 (Bankr. D. Kan. 2006) in support of the same argument for which they cite *Chemetron*. In *Morgan*, plaintiff Frederico drove a FedEx truck that had been manufactured by debtor. The truck ran into a telephone pole, Frederico was injured, and she sued on the grounds of product liability. Frederico's injury occurred after plan confirmation, and she had no relationship with the debtor at or before the confirmation. *Morgan* differs from the instant case because (1) here Defendants followed the Plan and thus violated no law (*see* discussion *supra*),

For the same reasons that *Chemetron* is distinguishable, it is irrelevant that the Plan and Orders were signed in August and September 2014, several months before the Plan Implementation Date of January 22, 2015. Section 9.1 of the Plan releases claims "taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Consolidated CCAA Plan that are in any way related to, or arising out of or in connection with the Claims . . . ." Plan § 9.1 (barring all claims "whether known or unknown . . . foreseen or unforeseen, existing or hereafter arising"); *see also* Recognition Order ¶ 5. Defendants' alleged misconduct occurred on or prior to the Plan Implementation Date of January 22, 2015. The Releases expressly cover conduct during the period prior to and including the Plan Implementation Date. Plan § 9.1; Sanction Order ¶¶ 11, 19, 29; Recognition Order ¶ 5. As the predecessor unitholders received notice of the Releases at the time the Plan and Orders were signed, the Releases are effective as to Plaintiffs' claims.

E. Applicability of Releases to Individual Defendants

Referring to paragraph 9 of the Recognition Order, Plaintiffs assert that "the part of the Recognition Order in question provides no protection to the [I]ndividual Defendants." Opp. ¶ 51. The other release provision of the Recognition Order, however, does apply to the Individual Defendants:

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and (2) Plaintiffs' predecessor unitholders were present during confirmation of the Plan, and thus, as successors and assigns, Plaintiffs had a relationship with Debtors at or before the time the Plan was confirmed. *Chance* is distinguishable from the instant case for the same reasons as *Morgan*: the plaintiff had no relationship with the debtor at or before the time the plan was confirmed.

> On the Plan Implementation Date . . . the Debtors, . . . the Trustees, the Directors and the Officers . . . (the "Releasees") shall be released and discharged from any and all demands, claims . . . .

Recognition Order ¶ 5. Similarly, the Releases in the Plan and Sanction Order, given full force and effect by the Recognition Order, also apply to the Individual Defendants. *See, e.g.*, Plan § 9.1; Sanction Order ¶¶ 9, 16, 29, 40. Therefore, the Court finds that Plaintiffs' challenge to the Releases as regards the Individual Defendants is unpersuasive.

F. Applicability of Releases to Fraud Claims

"[O]rders confirming a plan of reorganization can only be revoked if the order was procured by fraud." *In re Bowen*, 174 B.R. at 848, citing section 1144 of the Bankruptcy Code. Furthermore, the Sanction Order explicitly excepts "gross negligence or wilful misconduct" from the scope of its release regarding "the Arctic Glacier Parties, the Monitor and/or the CPS . . . acting in accordance with the terms of the Plan or this Sanction Order. . ." Sanction Order ¶ 14. Plaintiffs allege causes of action premised on fraud: violations of Section 10(b) of the 1934 Act and Rule 10b-5, as well as common law fraud. Compl. ¶¶ 103-123.

Plaintiffs' fraud claims will not survive the Motion for two reasons. First, the Complaint does not allege that the Plan and Orders were procured by fraud. Second, Plaintiffs bring their fraud claims on the theory that Defendants failed to meet their "concurrent and additional obligations" under the FINRA Rules. As explained above, however, Defendants had no "concurrent and additional obligations" under the FINRA Rules. In regard to making distributions, they only had obligations under the Plan, and

they fulfilled those obligations.[39] Thus, Defendants did not commit fraud when making distributions in accordance with the Plan. The exception in the Sanction Order's release for "gross negligence and wilful misconduct" is therefore inapplicable. The Releases remain effective in the face of Plaintiffs' fraud claims.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss in its entirety.

Dated: July 1, 2016

KEVIN GROSS, U.S.B.J.

[39] *See* Second Declaration of Marcos A. Ramos, Esq. in Support of Defendants' Motion to Dismiss the Complaint (D.I. 31), Ex. 2 (Twenty-third Report of the Monitor Alvarez & Marsal Canada Inc., *In re Arctic Glacier International Inc., et al.*, No. CI 12-01-76323 (Can. M.Q.B. Nov. 9, 2015) ¶ 1.10).

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Appendix “C”

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: ARCTIC GLACIER INTERNATIONAL, INC., Debtors in a foreign proceeding.	)	Chapter 15 Bk. No. 12-10605 (KG)
ELDAR BRODSKI ZARDINOVSKY, et al., Appellants,	)	
v.	)	Civ. No. 16-617-SLR
ARCTIC GLACIER INCOME FUND, et al., Appellees.	)	

ORDER

At Wilmington this 18th day of August, 2016, having received a recommendation from Chief Magistrate Judge Mary Pat Thynge that this case be withdrawn from the mandatory referral for mediation and proceed through the appellate process of this court;

IT IS ORDERED that the recommendation is accepted and briefing on this bankruptcy appeal shall proceed in accordance with the following schedule:

1. Appellants' brief in support of the appeal is due on or before **September 23, 2016.**

2. Appellees' brief in opposition to the appeal is due on or before **October 21, 2016.**

3. Appellant's reply brief is due on or before **November 14, 2016.**

United States District Judge

Appendix “D”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN MCNULTY,

Plaintiff,

v.

HOME CITY ICE CO.,

Defendant.
_____/

Case No. 08-cv-13178

Paul D. Borman
United States District Judge

R. Steven Whalen
United States Magistrate Judge

OPINION AND ORDER GRANTING DEFENDANT HOME CITY ICE COMPANY'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 284)

This action involves Plaintiff Martin McNulty's claims that he was terminated from his employment for his refusal to participate in an alleged unlawful market allocation conspiracy among packaged ice distributors originally named as Defendants in this action and that he was boycotted from employment in the packaged ice industry and threatened for his cooperation with the government in its investigation into alleged collusion in the packaged ice industry. The sole remaining Defendant in the case, Home City Ice Company ("Home City"), now moves for summary judgment on the single claim that remains against it for a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). (ECF No. 284, Home City's Motion for Summary Judgment.) Plaintiff filed a Response (ECF No. 288) and Home City filed a Reply (ECF No. 291). The Court held a hearing on Home City's motion on July 15, 2016. For the reasons that follow, the Court GRANTS Home City's motion.

I. BACKGROUND

The history of this litigation is set forth in multiple prior orders of this Court. *See, e.g., McNulty v. Reddy Ice Holdings, Inc., et al.*, No. 08-13178, 2016 WL 465490 (E.D. Mich. Feb. 8, 2016); *McNulty v. Reddy Ice Holdings, Inc., et al.*, No. 08-13178, 2011 WL 39131 (E.D. Mich. Jan. 6, 2011) (Whalen, M.J.); *McNulty v. Reddy Ice Holdings, Inc., et al.*, No. 08-13178, 2009 WL 1508381 (E.D. Mich. May 29, 2009), rev'd in part on reconsideration in *McNulty v. Reddy Ice Holdings, Inc., et al.*, 2009 WL 2168231 (E.D. Mich. July 17, 2009). To reiterate the facts and proceedings most pertinent here, Plaintiff filed this action on July 23, 2008, alleging that Defendants Arctic Glacier Income Fund, Arctic Glacier, Inc., Arctic Glacier International Inc. ("Arctic Glacier"), Reddy Ice Holdings, Inc. and Reddy Ice Corporation ("Reddy Ice"), Home City, Keith Corbin, Charles Knowlton and Joseph Riley were involved in an unlawful conspiracy and enterprise to (1) terminate Plaintiff from Arctic Glacier for refusing to participate in an unlawful market allocation scheme and (2) boycott Plaintiff from employment in the packaged ice industry in retaliation for his cooperation with the government in an investigation into the alleged unlawful collusion. Plaintiff asserted claims under RICO; the Sherman Act, 15 U.S.C. § 1; the Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.772; and common law tortious interference with prospective business advantage. Only the claim against Home City for violation of RICO's substantive provision, 18 U.S.C. § 1962(c), remains.

In an initial Opinion and Order Granting in Part and Denying Part Defendants' motions to dismiss, the Court dismissed Plaintiff's Sherman Act and state law antitrust claims, concluding that Plaintiff had failed to allege antitrust injury sufficient to confer standing to maintain his antitrust claims, dismissed Plaintiff's RICO claim against Home City, Reddy Ice, Messrs. Corbin and Riley,

and dismissed Plaintiff's tortious interference claim against all Defendants except Arctic Glacier. *McNulty*, 2009 WL 1508381, at *24. On July 17, 2009, in response to Plaintiff's motion for reconsideration, this Court issued an Order reversing in part its May 29, 2009 Order, reinstating only Plaintiff's RICO claim against certain Defendants based upon the Supreme Court's intervening decision in *Boyle v. United States*, 556 U.S. 938 (2009), which eased somewhat the threshold standard for pleading a RICO enterprise. *McNulty*, 2009 WL 2168231, at *3-4. On reconsideration in light of *Boyle*, the Court reinstated Plaintiff's RICO claim against Home City, Reddy Ice and Joseph Riley. *Id.* at *5.

Taken together, the Court's initial Opinion and Order and the ruling on reconsideration thus allowed for the following claims to proceed:

> (1) RICO claims under § 1962(c) against Arctic Glacier, Home City, Reddy Ice, Charles Knowlton and Joseph Riley based upon an alleged pattern of racketeering activity limited to the predicate acts of witness tampering and witness retaliation squarely directed at Plaintiff ("As alleged, and as limited by the Release, the RICO enterprise consisting of Arctic Glacier, Home City, Reddy Ice and Mr. Riley was to boycott Plaintiff from employment in the packaged ice industry in order to [dissuade] Plaintiff from cooperating with government officials and to punish Plaintiff for actually doing so." 2009 WL 2168231, at *5);[1] and
>
> (2) Tortious interference with prospective economic advantage against Arctic Glacier only ("Plaintiff has not alleged any facts demonstrating that any of the Defendants besides Arctic Ice interfered with an employment expectancy that Plaintiff allegedly had with a third party." 2009 WL 1508381, at *24).

In revising its opinion with regard to the enterprise, the Court expressly held that its May 29, 2009, holding with respect to the pattern of racketeering activity and proximate cause was

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[1] In its May 29, 2009 Order, the Court dismissed all claims against Corbin. 2009 WL 1508381, at *6. Plaintiff stipulated to dismiss Reddy Ice on April 13, 2015 and the Court terminated Reddy Ice as a party on that same day. (ECF No. 248.) On April 21, 2015, Plaintiff stipulated to the dismissal of Joseph Riley (ECF No. 252) and the Court entered an Order of dismissal as to Riley on April 22, 2015 (ECF No. 253).

undisturbed:

> Including Home City, Reddy Ice, and Mr. Riley as part of the RICO enterprise does not alter the pattern of racketeering activity and proximate cause findings. As alleged, and as limited by the Release, the RICO enterprise consisting of Arctic Glacier, Home City, Reddy Ice, and Mr. Riley was to boycott Plaintiff from employment in the packaged ice industry in order to persuade Plaintiff from cooperating with government officials and to punish Plaintiff for actually doing so.

2009 WL 2168231, at *5.

Following the Court's rulings on the Defendants' motions to dismiss, the parties engaged in discovery, appealing to the Court in several instances to resolve discovery disputes throughout 2009-2011. Meanwhile, the Department of Justice ("DOJ") had conducted a criminal investigation into the packaged ice industry, which ultimately resulted in guilty pleas by some of the original Defendants in this action, including Home City, to collusive market allocation in Southeastern Michigan. In January, 2012, this Court ordered that Plaintiff be given access to certain recordings that the DOJ had obtained in the course of its investigation, several of which were recordings that were made by the Plaintiff in his role as a cooperating government witness. (ECF No. 127, Order Granting Plaintiff's Motion for Equal Access to Recordings and Transcripts.)

On February 24, 2012, Arctic Glacier filed a Notice of Bankruptcy Filing (ECF No. 233) and on April 13, 2012, Reddy Ice filed its Notice of Bankruptcy Filing (ECF No. 234). Following the April 13, 2012 Reddy Ice filing, Plaintiff took no formal action in this case until January, 2015, when Plaintiff responded to Home City's motion for a protective order, in which Home City sought to destroy documents that it had retained since the 2008 filing of this action, in light of the prolonged inactivity in the case. (ECF No. 244, Motion for Protective Order.) Only then, spurred into action

by Home City's motion, did Plaintiff re-engage in this action.[2]

Plaintiff objected to Home City's motion for a protective order (ECF No. 245). On April 13, 2015, McNulty filed a Stipulated Dismissal of Defendant Reddy Ice (ECF No. 248) and contemporaneously filed a motion to sever his claims against the non-bankrupt Defendants remaining in the action and to proceed against them and also sought leave to amend his 2008 complaint to reassert claims that this Court dismissed in its 2009 Opinion and Order. In an Opinion and Order resolving McNulty's motions to sever and to amend, issued on February 8, 2016, this Court held that: (1) McNulty's claims against Arctic Glacier and Charles Knowlton were either released in, or are subject to the exclusive jurisdiction of, the Canadian and Delaware Bankruptcy Courts and are no longer properly before this Court, leaving only McNulty's substantive RICO claim against Home City in this action; and (2) based upon the law of the case doctrine and McNulty's undue delay, he was not entitled to amend his Complaint to reassert his previously-dismissed antitrust and RICO conspiracy claims. 2016 WL 465490, at *16, 24.

Now before the Court is Home City's motion for summary judgment on the sole remaining RICO claim against it in this action. For the reasons that follow, the Court GRANTS the motion and DISMISSES this action against Home City, the only remaining Defendant in the case, WITH PREJUDICE.

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[2] During this prolonged period of inactivity in this action, McNulty was, and continues to be, actively pursuing in the Arctic Glacier bankruptcy proceedings, among other claims, the identical claims he asserts in this Court against Home City. As discussed in this Court's February 8, 2016 Opinion and Order, approximately $14 million has been reserved for possible payment of Plaintiff's claims against Arctic Glacier in its Canadian bankruptcy proceedings. *See McNulty,* 2009 WL 465490, at *7, 15.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, a party against whom a claim, counterclaim, or cross-claim is asserted may file a motion for summary judgment "at any time until 30 days after the close of all discovery," unless a different time is set by local rule or court order. Fed. R. Civ. P. 56(b). Summary judgment is appropriate where the moving party demonstrates that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a). A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir. 1993). "A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A).

"Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. *See also Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987). If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence

of an element essential to that party's case, and on which that party will bear the burden of proof at trial," will mandate the entry of summary judgment. *Celotex*, 477 U.S. at 322-23. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 324. "The test is whether the party bearing the burden of proof has presented a jury question as to each element in the case. The plaintiff must present more than a mere scintilla of the evidence. To support his or her position, he or she must present evidence on which the trier of fact could find for the plaintiff." *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000) (internal quotation marks and citations omitted). The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The rule requires the non-moving party to introduce "evidence of evidentiary quality" demonstrating the existence of a material fact. *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997).

"Rule 56(e)(2) leaves no doubt about the obligation of a summary judgment opponent to make [his] case with a showing of facts that can be established by evidence that will be admissible at trial. . . . In fact, '[t]he failure to present any evidence to counter a well-supported motion for summary judgment alone is grounds for granting the motion.' Rule 56(e) identifies affidavits, depositions, and answers to interrogatories as appropriate items that may be used to support or oppose summary judgment." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009) (quoting *Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009)). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex*, 477 U.S. at 323-

34. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986) (footnote omitted).

In making the determination on summary judgment whether there are genuine issues of material fact for trial, the court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984). "'The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir. 2010) (quoting *In re Calumet Farm, Inc.*, 398 F.3d 555, 558 (6th Cir. 2005)). While all facts and factual inferences are drawn in favor of the nonmovant, *see Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), "[t]he 'mere possibility' of a factual dispute is not enough." *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 410 (6th Cir. 2008) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)). "If the evidence is merely colorable, . . . or is not significantly probative, . . . the court may grant judgment." *Anderson*, 477 U.S. at 249–50. In *Anderson*, the Court explained:

> [T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.
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> ***
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> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a

verdict. . . .

477 U.S. at 254. The party who bears the burden of proof must present a jury question as to each element of the claim. *Davis*, 226 F.3d at 511. Failure to establish a genuine issue of material fact as to an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991). Although all favorable inferences reasonably supported by the record must be granted to the plaintiff, *Matsushita*, 475 U.S. at 587–88, once the defendant moves for summary judgment, it becomes plaintiff's burden to produce evidence on each essential element of his claims. *Celotex*, 477 U.S. at 322–23. And plaintiff must produce enough evidence to allow a reasonable jury to find in his favor by a preponderance of the evidence. *Anderson* , 477 U.S. at 252. Plaintiff cannot meet his or her "burden by relying on mere '[c]onclusory assertions, supported only by [her] own opinions.'" *Green v. Central Ohio Transit Authority*, __F. App'x __, 2016 WL 2586840, at *3 (6th Cir. 2016) (quoting *Arendale v. City of Memphis*, 519 F.3d 587, 560 (6th Cir. 2008)) (alterations in original). Plaintiff "must show sufficient probative evidence, based 'on more than mere speculation, conjecture, or fantasy,' that would enable a jury to find in her favor." *Green*, 2016 WL 2586840, at *3 (quoting *Arendale*, 591 F.3d at 601).

Finally, all evidence submitted in opposition to a motion for summary judgment must ultimately be capable of being presented in a form that would be admissible at trial:

> The submissions by a party opposing a motion for summary judgment need not themselves be in a form that is admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."). Otherwise, affidavits themselves, albeit made on personal knowledge of the affiant, may not suffice, since they are out-of-court statements and might not be admissible at trial. See Fed.R.Evid. 801(c),

> 802. However, the party opposing summary judgment must show that she can make good on the promise of the pleadings by laying out enough evidence that will be admissible at trial to demonstrate that a genuine issue on a material fact exists, and that a trial is necessary. Such "'evidence submitted in opposition to a motion for summary judgment must be admissible.'" *Alpert v. United States*, 481 F.3d 404, 409 (6th Cir. 2007) (quoting *United States Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1189 (6th Cir.1997)). That is why "'[h]earsay evidence . . . must be disregarded.'" *Ibid.*; *see also North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1283 (6th Cir. 1997) ("[T]he testimony of Chaffee is inadmissible hearsay and therefore cannot defeat a motion for summary judgment."). It is also the basis of this court's repeated emphasis that unauthenticated documents do not meet the requirements of Rule 56(e). *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 532 n. 5 (6th Cir. 2002); *see also Meals v. City of Memphis, Tenn.*, 493 F.3d 720, 728-29 (6th Cir. 2007); *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993) ("This court has ruled that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." (citing *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir. 1991), and *State Mutual Life Assurance Co. of America v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979))).

CareSource, 576 F.3d at 558-59.

Likewise, affidavits offered in support of and in opposition to a motion for summary judgment must be based on personal knowledge or set forth such facts as would be admissible into evidence:

> A party opposing a motion for summary judgment cannot use hearsay or other inadmissible evidence to create a genuine issue of material fact. *Weberg v. Franks*, 229 F.3d 514, 526 n. 13 (6th Cir. 2000) (disregarding many of the plaintiff's allegations because they were based upon hearsay rather than personal knowledge); Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

Sperle v. Mich. Dept. of Corrections, 297 F.3d 483, 495 (6th Cir. 2002).

III. ANALYSIS

Home City moves for summary judgment on McNulty's RICO claim, arguing that there is

insufficient evidence on which a reasonable juror could conclude that Home City engaged in two or more predicate acts that are necessary to establish liability under § 1962(c). Section 1962(c) of the RICO Act provides, in part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). The discrete elements of a claim under 18 U.S.C. § 1962(c) are now well established: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima v. Imrex*, 473 U.S. 479, 496 (1985). Section 1961(1)(B) of the RICO Act defines the requisite "racketeering activity" with reference to "predicate acts," that are defined in relevant part as: "any act which is indictable under any of the following provisions of title 18, United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . section 1512 (relating to tampering with a witness, victim, or an informant), [and] section 1513 (relating to retaliating against a witness, victim, or an informant)." 18 U.S.C. § 1961(1)(B). In addition, a "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5).

This Court has already held that only those predicate acts that form the basis for McNulty's witness tampering and witness retaliation claims may be considered for purposes of establishing liability on McNulty's RICO claim. 2009 WL 2168231, at *5.[3] The Witness Tampering statute, 18

[3] The Court has concluded that predicate acts committed in furtherance of the antitrust market allocation scheme are not sufficiently related to the alleged employment boycott scheme to serve as predicate acts in establishing liability for the purported boycott scheme. In a January 6, 2011 Opinion and Order, Magistrate Judge Whalen discussed in depth the lack of relatedness between the market allocation scheme and the alleged boycott of the Plaintiff. Citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) and *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992). Magistrate Judge Whalen concluded that the two schemes had distinct purposes, results, participants and

U.S.C. §§ 1512(b)-(d) provides in relevant part:

> (b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
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> (1) influence, delay or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (D) be absent from an official proceeding to which such person has been summoned by legal process; or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both.
>
> (c) Whoever corruptly—

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victims, noting this Court's 2009 rulings that the "purpose of the enterprise was to boycott Plaintiff from employment in the packaged ice industry," and "the pattern of racketeering here is limited to the alleged acts of witness tampering and witness retaliation" which "were squarely directed at Plaintiff." 2011 WL 39131, at *2-3 (citations omitted).

Magistrate Judge Whalen also noted that the Sixth Circuit had previously concluded, in rejecting McNulty's claim to crime victim rights status related to the government's criminal antitrust prosecution, that "McNulty's firing and blackballing from the industry, if proved, are ancillary to the actions involved in forming a conspiracy and restraining interstate commerce." *Id.* at *3 (citing *In re McNulty*, 597 F.3d 344, 352 (6th Cir. 2010). In affirming Magistrate Judge Whalen's January 6, 2011 Opinion and Order, this Court added the observation that Plaintiff himself characterized his RICO lawsuit as "mainly related to witness tampering and retaliation, [involving] distinct legal and factual issues from the antitrust and securities cases." (ECF No. 212, Opinion and Order at 4.)

> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.
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> (d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from-
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> (1) attending or testifying in an official proceeding;
>
> (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
>
> (3) arresting or seeking the arrest of another person in connection with a Federal offense; or
>
> (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

In addition, 18 U.S.C. § 1512(k) provides: "Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The Witness Retaliation statute, 18 U.S.C. § 1513(e)-(f), provides in pertinent part as follows:

> (e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.
> (f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

McNulty also claims that Home City committed an act of wire fraud in connection with the

alleged boycott scheme. The Wire Fraud statute, 18 U.S.C. § 1343, provides in relevant part: "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, [or] representations . . . transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings . . . for the purpose of executing such scheme or artifice," shall be subject to imprisonment. Wire fraud requires proof of three elements: "The first element of wire fraud, then, is that the defendant devised or willfully participated in a scheme to defraud. The second is that he used or caused to be used an interstate wire communication 'in furtherance of the scheme'; and the third, that he intended 'to deprive a victim of money or property.'" *United States v. Faulkenberry*, 614 F.3d 573, 581 (6th Cir. 2010) (quoting *United States v. Prince*, 214 F.3d 740, 748 (6th Cir. 2000). "A scheme to defraud is 'any plan or course of action by which someone intends to deprive another . . . of money or property by means of false or fraudulent pretenses, representations, or promises.'" *Id.* (quoting *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003)) (alteration in original).

A "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Thus, McNulty must prove that Home City committed at least two predicate acts to establish Home City's liability on the sole remaining claim under § 1962(c) based on an employment boycott – *not* the market allocation scheme. *Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, 605-06 (E.D. Mich. 2015). In response to Home City's motion for summary judgment, McNulty states that "a jury could find that Home City committed at least five predicate acts" on the instant employment boycott scheme. (Resp. 11.) McNulty argues that its RICO claim against Home City presents genuine issues of material fact because a reasonable juror could conclude: (1) that Home City conspired with Arctic Glacier and other members of the RICO enterprise to retaliate

against McNulty as a witness by agreeing that McNulty should be terminated if he would not actively participate in the market allocation conspiracy and agree to cover up the conspiracy; (2) that after McNulty proceeded to contact government authorities, Home City conspired with other members of the RICO enterprise to tamper with McNulty as a witness; (3) that Home City retaliated against McNulty for his cooperation with the DOJ by declining to consider McNulty's online employment application in 2005, and falsely responding to his follow up phone call by indicating that there were no job openings; (4) that Home City again retaliated against McNulty in 2007 by failing to seek him out for employment when allegedly there was an opening for a Vice President of Sales following the death of Lou McGuire; and (5) that Home City conspired with other members of the RICO enterprise to offer a bribe to McNulty of at least $10,000 in 2005 if he agreed to stop cooperating in the federal antitrust investigation into the packaged ice industry. The Court examines the summary judgment evidence McNulty offers in support of each of these contentions to determine whether the evidence creates a triable issue on at least two predicate acts against Home City.

A. McNulty provides insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City conspired with Arctic Glacier and other members of the RICO enterprise to retaliate against McNulty by agreeing to terminate him in an effort to frustrate his cooperation with authorities in violation of 18 U.S.C. § 1513(f).

McNulty claims that Home City committed the predicate act of conspiring with Arctic Glacier, in violation of 18 U.S.C. § 1513(f), to retaliate against McNulty through termination of his employment with Arctic Glacier.[4] To prove that Home City conspired with Arctic Glacier to

[4] This Court dismissed McNulty's § 1962(d) RICO conspiracy claim in its May 29, 2009 Opinion and Order and did not reinstate the conspiracy claim in its July 17, 2009 Reconsideration Opinion, which very specifically revived *only* McNulty's substantive RICO claim under § 1962(c). However, because both the witness tampering and the witness retaliation statutes make a conspiracy to tamper or to retaliate a separate indictable offense under those statutes, *see* 18 U.S.C. § 1512(k) and 18

retaliate against McNulty by agreeing to a plan to terminate him in an effort to frustrate his cooperation with the government, McNulty must provide sufficient evidence on which a reasonable juror could conclude that Home City knew of and agreed to participate in the termination. "The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other." *Salinas v. United States*, 522 U.S. 52, 63 (1997). "Because the essence of the crime of conspiracy is agreement, the government must prove that each member of a conspiracy agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Patel*, 579 F. App'x 449, 461 (6th Cir. 2014) (citing *United States v. Shabani*, 513 U.S. 10, 15 (1994)). "'A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.'" *Id.* (quoting *Salinas*, 522 U.S. at 65).

Arctic Glacier hired McNulty in or around November, 2004 and terminated him a few months later on January 19, 2005. In order for Home City to be held liable as a participant in a scheme to terminate McNulty, there must be some evidence that Home City played some role in the alleged scheme prior to McNulty's termination on January 19, 2005. In support of the assertion that Home City committed the predicate act of conspiring with other members of the RICO enterprise to retaliate against McNulty by terminating him in order to frustrate his cooperation with authorities

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U.S.C. § 1513(f), McNulty seeks to proceed on such "conspiracy" claims as discrete alleged predicate acts, but only under the witness tampering and witness retaliation statutes. Thus, in analyzing McNulty's claim of conspiracy to violate the witness tampering and retaliation statutes, *see* section IIIA, and sections IIIB and IIID, *infra*, the Court must determine whether the evidence proffered by McNulty is sufficient to permit a reasonable juror to conclude, based on a preponderance of the evidence, that Home City agreed to participate in an endeavor to tamper with or retaliate against McNulty for his cooperation with the government.

in revealing the market allocation conspiracy, McNulty relies on a statement allegedly made to him by Knowlton (of Arctic Glacier) threatening McNulty that if he did not cooperate in the market allocation conspiracy, Knowlton would arrange a group boycott of McNulty from employment at Home City or any other ice company in the area, stating that he (Knowlton) had relationships with Home City and others that would enable him (Knowlton) to boycott McNulty. In support of this assertion, McNulty offers his own declaration (Pl.'s Ex. 15), his deposition testimony (Pl.'s Ex. 16), and a letter that he sent to Michigan Assistant Attorney General Michelle Rick, on March 21, 2005 setting forth these same allegations (Pl.'s Ex. 17). McNulty further asserts that on November 10, 2004, Keith Corbin (Arctic Glacier) similarly threatened McNulty with termination and boycott if he did not cooperate. In support of this assertion he relies again on his declaration, his own deposition testimony, his answers to interrogatories, his March 21, 2005 letter to Ms. Rick and on a January 25, 2005 calendar entry from his personal day planner stating: "Wed. Nov. 10th (2004) told that I'd be frozen out." (Pl.'s Ex. 43.)

From this evidence, none of which involves conduct or statements attributed to Home City, McNulty argues that a reasonable juror could "infer" that Knowlton and Corbin would not have made these threats if Home City, a confessed co-conspirator in the market allocation scheme, had not agreed to participate in the retaliation scheme. While McNulty is entitled to all of the favorable inferences from this evidence, he "must show sufficient probative evidence, based 'on more than mere speculation, conjecture, or fantasy,' that would enable a jury to find in [his] favor." *Green*, 2016 WL 2586840, at *3 (quoting *Arendale*, 591 F.3d at 601). In opposition to Home City's motion for summary judgment, McNulty was required to "present more than a mere scintilla of the evidence" and to cite "to particular parts of materials in the record" that would permit a jury to

resolve the disputed fact in his favor. There is nothing in this evidence to suggest that there was any communication, let alone agreement, between Arctic Glacier and Home City prior to McNulty's termination by Arctic Glacier on January 19, 2005, on the issue of terminating McNulty in retaliation for his anticipated cooperation with the government in the criminal antitrust investigation. Evidence that relies solely on innuendo and requires pure speculation to adopt Plaintiff's version of the facts is insufficient to withstand a motion for summary judgment. Standing alone, this evidence, all of which relates to threats made by Knowlton and Corbin of Arctic Glacier about actions that they would take to "freeze out" McNulty, is insufficient to support the inference that Home City had agreed with Arctic Glacier to participate in the termination/retaliation scheme.

In further support of this alleged predicate act, McNulty asserts that at a meeting with Corbin on January 11, 2005, McNulty expressed to Corbin his unwillingness to participate in the market allocation scheme or the cover up and Corbin "reacted negatively." According to McNulty, it was after this meeting that McNulty decided to contact authorities about the "collusion." In support of this assertion, McNulty again relies on his own declaration, his deposition testimony and entries in his personal date book on January 13, 14, and 20, 2005. These date book entries reference the website for the Department of Justice, the "U. S. Office of Special Council [sic]" and the "Whistle Blower Act," and include an entry on January 20, 2005 that reads: "9-15-5 Keith Corbin (1) collusion - barring me from going to work w/a competitor, because they are in collusion w/ them, (2) price-fixing." (Pl.'s Mot. Ex. 25, 26, 27.)

McNulty states that he informed a former colleague of his, Geoff Lewandowski, of his intention to cooperate with the government and Lewandowski "shared this information with Arctic Glacier." McNulty states that in retaliation, and to discourage him from proceeding to contact

authorities, Corbin and other Arctic Glacier executives decided on or around January 19, 2005 to terminate him. In support of these assertions, McNulty relies on his declaration and on a chain of emails on January 19, 2005, between Arctic Glacier personnel, indicating that McNulty would be terminated on January 20, 2005 and offered a severance package in exchange for signing a release. (Pl.'s Exs. 44, 45.) Nothing in this evidence provides any factual basis for a jury to conclude, based on a preponderance of the evidence, that Home City was involved in any of this conduct regarding the termination of McNulty, other than the pure innuendo that Home City would necessarily have been on board with a conspiracy to terminate McNulty to discourage his cooperation with the government because Home City was part of the market allocation conspiracy. But the essence of a conspiracy is an agreement to participate in a collective venture directed to a common goal. *Patel*, 579 F. App'x at 461. This evidence is insufficient to permit a reasonable juror to conclude that Home City knew of and was part of a separate alleged scheme to terminate McNulty in retaliation for his cooperation with government.

McNulty next asserts that Arctic Glacier decided on January 19, 2005, to terminate McNulty and that "Corbin met with Home City the next day [January 20, 2005], and Home City approved Corbin's decision." Pl.'s Resp. 13. For support of this assertion, which does directly mention Home City, McNulty offers a largely illegible calendar page for the month of January 2005. (Pl.'s Ex. 46.) At the hearing on Home City's motion, Home City's counsel acknowledged that Home City produced this calendar page, but all parties agreed that apart from a small scribbled notation that appears to read "Keith Corbin," nothing else is legible for the entry on January 20, 2005, and nothing else is known about this exhibit. Lou McGuire passed away in 2007 and beyond Home City's concession that it produced this calendar page that mentioned Corbin's name, McNulty provides no

authentication or context for this document, that would support the inference he would ask a jury to make, i.e. that Corbin and McGuire met, discussed McNulty's termination and that Home City "approved" of Corbin's decision to terminate McNulty. Viewing the facts in the light most favorable to the Plaintiff, this calendar entry suggests that a calendar page produced by Home City contains a notation for January 20, 2005, regarding Keith Corbin. Even assuming the document could be further authenticated as coming from Lou McGuire's calendar (and Plaintiff makes no suggestion as to how this would occur), this document does not establish if there was a meeting, a phone call or neither or, if there was some communication, whether McNulty was discussed. There is absolutely no other evidence offered in support of the assertion either (1) that Corbin did meet or speak with Lou McGuire on January 20, 2005 or (2) even if a meeting or conversation did occur, that McNulty was discussed. There is certainly no evidence to suggest that Corbin shared with McGuire the details of a scheme to terminate McNulty (a decision that according to Plaintiff was in fact made by Arctic Glacier the day before the January 20, 2005 alleged meeting) for his cooperation with the government and/or that Home City "approved Corbin's decision." Lou McGuire died in 2007. Consequently, a jury is left to speculate whether a meeting or conversation occurred on January 20, 2005, and, if so, what was discussed. This is insufficient evidence on which a jury could reasonably conclude that indeed McGuire and Corbin met or spoke on January 20, 2005, and that the conversation included Corbin sharing the details of McNulty's termination in retaliation for his government cooperation and that Home City "approved" of the retaliatory termination. This evidence does not create a genuine issue of material fact that Home City was somehow complicit (after-the-fact) in Arctic Glacier's January 19, 2005 decision to terminate McNulty to discourage his cooperation with the government.

Although McNulty is entitled to all favorable inferences from the January 20, 2005 calendar entry, that evidence must create more than "a metaphysical doubt as to the material facts" and must be substantial enough to allow a reasonable jury to find in McNulty's favor by a preponderance of the evidence. The January 20, 2005 calendar entry, even granting McNulty all favorable inferences reasonably supported by the evidence that flow from that entry, simply cannot support the evidentiary weight that McNulty places on it.

In further support of his charge that Home City committed the predicate act of conspiracy to engage in "witness retaliation" at or around the time of McNulty's termination, McNulty relies on the fact that Arctic Glacier hired a news sales manager, Jim Forsberg to replace McNulty, who allegedly demonstrated a willingness "to participate in the conspiracy and to cover it up." In support of this assertion, McNulty relies on Corbin's deposition testimony, in which Corbin admits that he informed Forsberg about the conduct to which Arctic Glacier ultimately pled guilty, i.e. agreeing not to call on a Home City customer who complained about Home City's service, and that Forsberg did not object to that conduct. (Pl.'s Ex. 19, April 6, 2011 Deposition of Keith Corbin, 116:7-22, 118:17-24.) McNulty also relies on statements made to him by Riley that he (Riley) was surprised that Arctic Glacier had hired Forsberg because he was more of a "dispatch guy" than a "sales guy," and that he (Riley) on behalf of Tropic Ice had entered into a price-fixing agreement with Forsberg. Pl.'s Ex. 15, McNulty Decl. ¶ 15. McNulty also relies on an audio recording of a conversation that he recorded between himself and his former colleague, Geoff Lewandowski, in which Lewandowski expressed surprise that Arctic Glacier hired Forsberg because he was "not qualified."[5] (Pl.'s Ex. 6,

[5] McNulty offers no affidavit, declaration or other sworn statement from Lewandowski in support of his opposition to Home City's motion. He offers only the tape recorded conversations, which involve Lewandowski's personal opinions and representations of what others purportedly thought

Audio Recording PIL #41.) This evidence, viewed in the light most favorable to McNulty, suggests at most that Arctic Glacier replaced McNulty with an unqualified candidate who agreed to Keith Corbin's request that he not call on a competitor's customer. There is nothing in this evidence from which a reasonable juror could reasonably infer that Home City, not even mentioned in this evidence, conspired in Arctic Glacier's decision to terminate McNulty.

In response to Home City's motion for summary judgment, McNulty has produced insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City committed the predicate act of conspiring

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or said, which are out-of-court statements offered here to establish the truth of the assertion that Home City "agreed" to Arctic Glacier's alleged retaliatory termination of McNulty. It is axiomatic that hearsay statements that fit within no exception cannot be relied upon to defeat a motion for summary judgment. *CareSource*, 576 F.3d at 558. Although summary judgment evidence need not necessarily be presented in a *form* that will be admissible at trial, the proponent of such evidence must show that he can "make good on the promise" to make such evidence admissible at trial. *Id.* McNulty has failed to establish the admissibility of the statements made by Lewandowski in the tape recorded conversations. There is no evidence or even a suggestion that Lewandowski was a member of any conspiracy, and thus his statements cannot be excluded from the hearsay rule under Fed. R. Evid. 801(d)(2)(E). Indeed, the evidence suggests that Lewandowski was a former colleague and personal friend of McNulty's. At the hearing on Home City's motion, when asked to address the issue of the admissibility of Lewandowski's tape recorded statements, McNulty's counsel simply stated that Lewandowski, who notably had been recently terminated by Arctic Glacier at the time of the recordings, was nonetheless acting as an "agent" of Arctic Glacier when speaking with McNulty in the tape recorded conversations. While counsel for McNulty cited no rule or legal authority for this proposition, the Court assumes he was appealing to the exclusion from hearsay provided in Fed. R. Evid. 801(d)(2)(D), for statements made by a party's agent on a matter within the scope of the employment relationship. McNulty cites no evidence, law or analysis to support this suggestion of agency. "It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." *Bishop v. Gosiger, Inc.*, 692 F. Supp. 2d 762, 775 (E.D. Mich. 2010) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997)). "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," are abandoned. *Indah v. S.E.C.*, 661 F.3d 914, 925 (6th Cir. 2011). Lewandowski's statements on the recorded conversations on which McNulty seeks to rely are hearsay, without an established exclusion or exception that would allow for their admissibility at trial, and may not be considered on summary judgment. *Carter v. University of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003) (quoting *Jacklyn v. Schering Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999)).

in Arctic Glacier's decision to terminate McNulty allegedly to retaliate against him to dissuade him from acting as a government witness.[6]

B. McNulty has produced insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City conspired with Arctic Glacier and other members of the RICO enterprise to tamper with McNulty after learning that he had begun to cooperate with the government in violation of 18 U.S.C. § 1512(k).

McNulty argues that a reasonable jury could conclude that, just after McNulty proceeded to contact government authorities, Home City committed the predicate act of conspiring with other members of the RICO enterprise to tamper with McNulty as a witness in violation of 18 U.S.C. § 1512(k). In support of this, McNulty relies on a letter that he sent to the State of Michigan Consumer Protection Division on March 21, 2005, detailing the alleged unlawful activities of Arctic Glacier and others. Pl.'s Ex. 17. In this letter, McNulty stated that he wished to file a formal complaint against Arctic Glacier and Party Time Ice Co. (McNulty's previous employer, owned by Chuck Knowlton, that was acquired by Arctic Glacier in January, 2005). McNulty details his early interactions with Keith Corbin regarding his potential salary as sales manager at Arctic Glacier, in which Corbin allegedly told McNulty that his salary expectations were too high. When McNulty suggested he would seek work for another ice company, Corbin allegedly told McNulty that he

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[6] It is unclear whether McNulty's claim is that these allegations support a witness retaliation or a witness tampering claim. McNulty describes this first alleged predicate act as follows: "Home City conspired with Arctic Glacier and other members of the RICO conspiracy *to retaliate* against McNulty as a witness, agreeing that McNulty should be terminated if he would not actively participate in the market allocation conspiracy, including covering up the conspiracy." Pl.'s Resp. 11-12 (emphasis added). However, McNulty then drops a footnote arguing that "witness tampering does not require an ongoing investigation, and it does not require that the victim intended to cooperate with authorities." Pl.'s Resp. 12 n. 69. Whether couched as a retaliation or a tampering claim, the analysis of Home City's involvement remains the same with regard to events related to Arctic Glacier's January 19, 2005 decision to terminate McNulty.

would never be hired by Home City "due to their relationship with Arctic Glacier." 3/21/05 Letter at 1. McNulty also alleges in this letter that Corbin told him U.S. Ice would never hire him because they also had already agreed with Arctic Glacier to keep their prices up. *Id.* at 2. McNulty further explains in this letter that although he was aware that Arctic Glacier and Home City "colluded to fix prices," he was "rather stunned by Mr. Corbin's arrogant threats and blatant remarks regarding my potential opportunities to work for another ice company." *Id.*

McNulty claims that he told Geoff Lewandowski that he had sent the letter and that "right after that," on March 28, 2005, McNulty received a call from Fiaz Simon (a "business associate" of McNulty's) who said that he was calling on behalf of Knowlton of Arctic Glacier and that Knowlton wanted to meet with McNulty about either hiring him back to Arctic Glacier or offering McNulty a monetary incentive to make him happy. In support of these statements, McNulty relies on his own deposition, his Declaration, a letter he wrote to the DOJ and his responses to Interrogatories.[7] (ECF Nos. 16, 18, 29.) McNulty states that he told Fiaz Simon that he would meet with Knowlton but only with his (McNulty's) lawyer present. The meeting never took place.

From this evidence, McNulty asserts, a reasonable juror could conclude that, in light of the market allocation conspiracy between Arctic Glacier and Home City and Knowlton's alleged statement to McNulty that he (Knowlton) had a relationship with Home City that would allow him (Knowlton) to enforce a boycott, that this was an attempted bribe "made within the scope of the conspiracy." Again, Knowlton's (Arctic Glacier) statements about his alleged ability to control

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[7] McNulty offers no declaration, affidavit or other sworn statement from Fiaz Simon. *See* Fed. R. Civ. P. 56(c)(4) and 28 U.S.C. § 1746. "Statements that are not sworn in one of these two ways are not competent summary judgment evidence." *Worthy v. Michigan Bell Telephone Co.*, 472 F. App'x 342, 343-44 (6th Cir. 2012). The same hearsay challenges that would apply to Lewandowski's statements also apply to statements attributed to Fiaz Simon. *See supra* footnote 5.

Home City's hiring practices do not demonstrate that Home City was aware of and intended to participate in an endeavor to tamper with McNulty's cooperation with the government. *See Salinas*, 522 U.S. at 65 (noting that the "partners in the criminal plan must agree to pursue the same criminal objective"). None of this evidence directly implicates Home City or even provides the basis for a reasonable inference of Home City's knowledge of or involvement in this alleged attempted "bribe." A juror would have to infer that Home City was aware that McNulty had a written a letter to the State of Michigan and was aware of Fiaz Simon's actions allegedly in response to that letter based upon (1) Home City's participation in the market allocation conspiracy and (2) statements made by Knowlton (Arctic Glacier) that he had the power to enforce a boycott. Not only is this inference based on inference, but it is hearsay based on hearsay with no noted exceptions set forth by McNulty.

McNulty has failed to produce sufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City knew about and agreed to Fiaz Simon's alleged attempt to arrange a meeting between Knowlton and McNulty to discuss an alleged "monetary incentive to make [McNulty] happy." This is insufficient evidence on which a reasonable juror could conclude that Home City committed the predicate act of conspiring with other members of the RICO enterprise to tamper with McNulty as a witness in violation of 18 U.S.C. § 1512(k).

C. McNulty has produced insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City retaliated against McNulty by refusing to hire him in 2005 in retaliation for his cooperation with the DOJ or that such retaliation was the "but for" and proximate cause of McNulty's injury.

McNulty argues that a jury could reasonably conclude that Home City committed the predicate act of witness retaliation based on the fact that Home City did not hire McNulty in 2005

when McNulty submitted an online application. McNulty states that he began cooperating with the DOJ in May, 2005 and that his non-compete with Arctic Glacier expired on July 27, 2005. McNulty states that days after his non-compete expired, Knowlton called Lou McGuire of Home City to "warn Home City" about McNulty, stating to McGuire that he (Knowlton) had learned from Lewandowski that McNulty was responsible for the FBI/DOJ investigation and that McNulty's wife had complained to him (Knowlton) that Knowlton had ruined the McNulty family. McNulty alleges that a few days later, Corbin called McGuire about McNulty and agreed to let McGuire know what Arctic Glacier learned as the investigation unfolded.

McNulty states that shortly thereafter, he applied to Home City for employment. McNulty responded in interrogatories that in early September, 2005, he submitted an online application to Home City via their website. (ECF No. 31, Pl.'s Interrog. Resp. No. 10.) McNulty states that he sent a follow up letter to Home City on September 16, 2005, and called their human resources department at some point thereafter, but was not hired despite other employer's opinions of him as having "an impressive resume" and Geoff Lewandowski's opinion that it would have cost Home City nothing to hire McNulty as a commission-based contractor. McNulty alleges that Lou McGuire of Home City told Knowlton about McNulty's employment application and assured Knowlton that Home City had not hired McNulty. McNulty claims that he was later told by Lewandowski and Riley that he (McNulty) was being blackballed by Home City.

In support of this claim, McNulty relies on an August 1, 2005, handwritten note presumably written by Lou McGuire (now deceased) stating that McGuire did receive a phone call from Knowlton that day informing McGuire that Geoff Lewandowski had been contacted by the FBI concerning price fixing in the ice industry and was going to meet with the FBI the following week.

(Pl.'s Resp. Ex. 34.) The note further explains that Knowlton told McGuire that the FBI investigation was "spurred by Marty McNulty (Chuck's ex sales mgr also let go by Arctic)." *Id.* The note explains that Knowlton stated to McGuire that McNulty was irate about the way he was treated during Knowlton's sale of the Party Time business to Arctic and that McNulty's wife had called Knowlton and screamed at him for ruining the McNulty family. *Id.*

In further support of this claim, McNulty relies on an August 3, 2005 handwritten note presumably written by McGuire indicating that McGuire had spoken with Keith Corbin who informed McGuire that Arctic Glacier was aware of the phone call to Home City from Chuck Knowlton. Pl.'s Resp. Ex. 35. The note continues that the FBI is supposed to interview Lewandowski that week and that "they" (Arctic presumably) will let Home City know "what is going on in this." *Id.* In his April 6, 2011 deposition, Corbin confirmed that he did call McGuire, at Knowlton's direction, to tell him that they were being investigated by the FBI. Pl.'s Resp. Ex. 19, April 6, 2011 Deposition of Keith Corbin. Corbin did not recall mentioning McNulty in that conversation and McGuire's notes also do not indicate that he and Corbin discussed McNulty - only that Lewandowski was meeting with the FBI.

Next, in answers to McNulty's first set of interrogatories on May 23, 2011, Knowlton responded that Knowlton recalled that "at some point Mr. McGuire told him that Mr. McNulty had applied and Home City did not hire him." Pl.'s Resp. Ex. 47, Knowlton's Answers to Interrog. p. 5. Knowlton further answered that to the best of his recollection, "Mr. McGuire had said this had happened a few months before their conversation." *Id.* This answer was in response to an interrogatory that asked Knowlton to identify and describe any communication between him and any other person relating to the employment or hiring of McNulty or relating to any employment

inquiries about McNulty's prospective employment. *Id.* McNulty's counsel conceded at oral argument that there is no evidence in the record to establish when this conversation occurred.

McNulty also supports this alleged predicate act with his assertion that Lewandowski and Riley told him that Home City was blackballing him. McNulty supports this assertion with his own deposition testimony in which he refers to his taped conversations with Riley (Pl.'s Ex. 3) and Lewandowski (Pl.'s Ex. 4). McNulty testified in his deposition that Riley (Tropic Ice) told him that Mr. Knowlton (Arctic Glacier) had told him (Riley) that he (McNulty) was being blackballed in the industry and no one would hire him in the ice industry. (Pl.'s Ex. 16, McNulty Dep. 103-04.) Mr. McNulty testified that it was Lewandowski who specifically mentioned, in the tape recording of their conversation on September 7, 2005, that Home City was blackballing him. McNulty Dep. 104-05. McNulty testified that Riley only referred to Knowlton blackballing McNulty and did not specifically mention Home City. *Id.* 105. But then, just moments later in the deposition, McNulty testified that Lewandowski only mentioned that Knowlton told him (Lewandowski) that McNulty was being blackballed and would never find a job in the ice industry. McNulty confirmed later in his deposition that Lewandowski never indicated that Knowlton had had conversations with representatives of any other ice company about blackballing McNulty. McNulty Dep. 312:21-24.

McNulty also claims that when he once called Home City's offices in Ohio from Michigan to follow up on his employment application, he was told that there were no openings for a sales position. He argues that this was a false and fraudulent communication in violation of the wire fraud statute, 18 U.S.C. § 1343, a separate predicate act from the witness retaliation. "When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of Rule 9(b), a plaintiff must "(1) specify the statements that the plaintiff contends were fraudulent, (2)

identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 404 (6th Cir. 2012). McNulty's evidence falls far short of meeting these basic pleading requirements, and shorter still from meeting his heightened burden on summary judgment to come forward with "evidence of evidentiary quality" to support his claims.

Home City replies, with evidence that stands unrebutted, that these statements were not false because there were no openings and no sales personnel were hired when McNulty submitted his application in September, 2005 (or for many years thereafter). Home City states that: "The undisputed evidence is that the alleged statement [that Home City had no openings] was true." Def.'s Reply 6. In support of this assertion, Home City offers the Declaration of Jay Stautberg, the Chief Financial Officer and Assistant Secretary of Home City Ice Company. ECF No. 284, Def.'s Mot. Ex. 6, Feb. 16, 2016 Declaration of Jay Stautberg. Mr. Stautberg has held this position with Home City since 1994 and has had authority over Home City's Human Resource function. *Id.* ¶ 2. Mr. Stautberg states that his review of Home City's records indicates that in September 2005, Martin McNulty sent an employment inquiry into Home City's website. *Id.* ¶¶ 3-4. Mr. Stautberg further testifies that at that time Home City was not soliciting resumes or seeking sales professionals and that prior to 2005 and for many years thereafter, Home City had the same sales representative, John Borchers, covering the State of Michigan. *Id.* ¶ 3. In fact, for several years prior to 2005 and for several years thereafter, the Home City sales management team consisted of just three people: Lou McGuire, Greg Geiser and Ed Tice. Mr. McGuire died in June, 2007, and was not replaced. *Id.* ¶¶ 6-7. After Mr. McGuire's death, Messrs. Tice and Geiser were Home City's entire sales management team until Mr. Tice retired years later. Not until 2013 did Home City hire an

independent contractor in sales. *Id.* ¶¶ 8-9.

This evidence is unrebutted. In support of his statement that "in fact he was being blackballed," McNulty cites his own deposition testimony. McNulty provides no evidence that in fact Home City did hire other sales personnel at the time that they declined McNulty's request for employment, or at anytime thereafter. McNulty asserts that "he could have won new business [for Home City] as a contractor," and that there was no reason for them not to hire him. This is pure conjecture on McNulty's part, but in any event the unrebutted evidence establishes that Home City never utilized independent contractors until some time in 2013. No reasonable juror could conclude, based on this evidence, that Home City committed wire fraud when someone at Home City informed McNulty in 2005 that the company was not hiring sales personnel.

Because Home City's evidence in support of its claim that it was not hiring at the time of McNulty's application (or at anytime thereafter) is undisputed by any evidence other than McNulty's conjecture, McNulty cannot establish the necessary element of causation for this alleged act of witness retaliation. "To allege a valid RICO claim . . . a plaintiff must show not only that the predicate act was a "but for" cause of plaintiff's injuries, but also that it was a proximate cause." *Heinrich*, 668 F.3d at 405 (citation omitted). "A plaintiff must show some direct relation between the injury asserted and the injurious conduct alleged." *Id.* (quotation marks and citation omitted). To succeed on a § 1962(c) claim, this causation must be established as to *each* defendant's alleged predicate acts – it is not sufficient for McNulty to show that the "scheme" proximately caused his injuries. *Kerrigan*, 112 F. Supp. 3d at 609 ("[I]n order to state a § 1962[(c)] claim against any Defendant, Plaintiffs must allege a clear causal connection between that Defendant's alleged predicate acts and their injuries.") (alteration added).

McNulty has failed to produce sufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that the alleged predicate act of retaliation in 2005 was the "but for" and proximate cause of McNulty's claimed injury. The undisputed evidence is that Home City was not hiring sales people in any capacity at that time or for years before or after that time and would not have hired McNulty regardless of any claimed retaliatory motive. The party who bears the burden of proof must present a jury question as to each element of the claim. *Davis*, 226 F.3d at 511. Failure to establish a genuine issue of material fact as to an essential element of a claim, here causation, renders all other facts immaterial for summary judgment purposes. *Elvis Presley*, 936 F.2d at 895. Accordingly, McNulty cannot establish Home City's RICO liability based on this alleged predicate act.

D. There is insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City retaliated against McNulty by not offering McNulty the position of Vice President of Sales in 2007 when Lou McGuire passed away or that such retaliation was the "but for" and proximate cause of McNulty's injury.

McNulty argues that a jury could reasonably conclude that Home City "again boycotted" McNulty in 2007 in retaliation for his cooperation with the DOJ when there was "an opening for a VP of sales" and Keith Corbin (Arctic Glacier) did not recommend to Ted Sedler (Home City) that Home City hire McNulty. In support of this argument, McNulty relies on a tape recorded conversation between Keith Corbin and Ted Sedler of Home City, in which there was a discussion about "keeping the peace out there" among the ice companies. Pl.'s Resp. Ex. 2. The Court discussed this evidence in its 2016 Opinion and Order denying McNulty's motion for leave to amend and concluded that the conversation did not plausibly suggest an agreement to boycott sales people who refused to participate in the market allocation conspiracy. 2016 WL 465490, at *22. The Court

observed that if the conversation plausibly suggested any type of collusion, it would be an agreement among competitors to stay out of each other's territories, which is precisely the conduct targeted by the DOJ antitrust investigation. *Id.* That same evidence has no better traction here. In fact, the inferential leap grows even larger here, where the suggestion is that Corbin did not recommend McNulty to Sedler and that Home City acted on that "non-suggestion" and decided not to seek out McNulty and offer him the job. In fact, the undisputed evidence is that Home City never hired a replacement for Mr. McGuire and his job duties were assumed by Home City existing personnel, Messrs. Geiser and Tice. Def.'s Mot. Ex. 6, Stautberg Decl. ¶¶ 7-8.

Additionally, it is undisputed that at the time of this phone call in September, 2007, Ted Sedler was cooperating with the government and placed the call to Corbin at the behest of the government. Sedler was seeking to elicit inculpatory statements from Corbin for the government to use in its antitrust case. According to Sedler, he represented in the conversation with Corbin that Home City was looking for a new Vice President as a "talking point" in an attempt to gather evidence against Arctic Glacier for the government's antitrust investigation, but in fact Home City was not looking to, and never did, replace Lou McGuire. Def.'s Reply Ex. 5, March 21, 2016 Declaration of Ted Sedler ¶¶ 4-6. McNulty does not dispute that Home City never replaced Lou McGuire and does not dispute that Sedler was cooperating with the government in its antitrust investigation when he placed this call to Corbin.

In response to Home City's sworn testimony in support of its assertion that Lou McGuire was never replaced, and that Sedler was acting as a government witness on the phone call to Corbin, McNulty was required to come forward with more than just his conjecture that Home City did not seek him out to offer him the position of Vice President of Sales because of its participation in a

conspiracy to retaliate against him for his cooperation with the government. There is insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City committed the act of witness retaliation when it refused to hire McNulty to replace Lou McGuire 2007. Even assuming a genuine issue of material fact as to this predicate act, the evidence is undisputed that Home City did not replace McGuire in 2007 or at anytime thereafter. Thus, the same failure to establish causation that dooms McNulty's claim of retaliation based on his 2005 employment inquiry also defeats his claim based on this 2007 failure to hire. Accordingly, McNulty cannot establish Home City's RICO liability based on this alleged predicate act.

E. There is insufficient evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude that Home City conspired with other members of the RICO enterprise to offer McNulty a bribe of at least $10,000 if he agreed to stop cooperating with the FBI and the DOJ in their antitrust investigation into the packaged ice industry.

McNulty claims that Home City committed the predicate act of conspiring with Arctic Glacier to offer McNulty a bribe to stop cooperating with the government, presumably asserting an alleged violation of 18 U.S.C. § 1512(k), although in his brief McNulty cites § 1513, the retaliation statute. Pl.'s Resp. 17. In support of this assertion, McNulty relies on an audio recording in which McNulty asked Lewandowski about a payment that Knowlton tried to make to McNulty through Lewandowski and Lewandowski told McNulty that Knowlton wanted Lewandowski to convey to McNulty that there was "a little bit of cash there waiting for [him] if [he] just sits there and kind of forget anything you ever talked to anybody about." Pl.'s Mot. Ex. 4. Arctic Glacier emails in or around July, 2005, confirm that its employee Knowlton did express a desire to make a payment to McNulty but that Arctic Glacier "was against it 100 percent," suggesting to Knowlton that he

"handle it himself if he so chooses." Pl.'s Mot. Ex. 36. McNulty links this evidence to Home City's answers to interrogatories in which Home City responds that: "Ted Sedler and Greg Geiser recall only that Lou McGuire told them that Chuck Knowlton discussed with Lou McGuire a possible payment to McNulty. Messrs. Sedler and Geiser do not recall when they heard this or whether this was a result of a McNulty demand or not." Pl.'s Ex. 37, p. 2. Home City goes on to respond that because "Mr. McGuire is unavailable, the details of his conversation with Mr. Knowlton are unknown." *Id.* McNulty asserts that this is evidence that Knowlton and McGuire discussed the payment to McNulty and "agreed on a course of action." Pl.'s Resp. 17. Despite the fact that McNulty received this interrogatory response in September, 2011, McNulty never attempted to depose Messrs. Sedler or Geiser to try to drill down on their "recollection" of this comment. Thus, relying on this recollected statement allegedly made by a deceased individual, completely untethered to time or context, McNulty would have a jury conclude that Knowlton and McGuire discussed the "bribe" to McNulty and "agreed on a course of action."

Although Home City has its version of the facts related to a "payment" – that the money that Knowlton wanted to offer was actually McNulty's earnout that he was due from Arctic Glacier and had nothing to do with a bribe – the Court is required to accept McNulty's version of the facts at this stage of the proceedings. Def.'s Reply 8. It is undisputed that, in the end, Arctic Glacier's Knowlton did not make the payment for fear it would look like a bribe. *Id.* at 8, n. 12. Even viewing the facts exactly as McNulty presents them, there is simply nothing in this evidence to demonstrate that Home City and Knowlton "agreed to a plan of action." Even if the Lewandowski audio recording were admissible and added to the mix, *see supra* footnote 5, Lewandowski is giving his opinion of what he thought Knowlton was trying to accomplish with the payment to McNulty. And even if Knowlton

was hoping to persuade McNulty to cease cooperation with the $10,000 payment that was never made, there is no evidence to establish *when* Knowlton mentioned a $10,000 payment to McGuire, or that Knowlton communicated to McGuire the purpose of a possible payment to McNulty, or that McGuire agreed that a payment should be made to dissuade McNulty's coopertaion. McNulty's assertion that McGuire and Knowlton "agreed on a plan of action" finds no support in the evidence and cannot be reasonably inferred from the evidence presented. There is insufficient evidence on which a reasonable juror could conclude, based on a preponderance of the evidence, that Home City and Knowlton were "partners in a criminal plan" to bribe McNulty or that Home City knew about and agreed to Knowlton's alleged plan to offer a bribe of $10,000 to McNulty if he agreed to stop cooperating with the government. McNulty has failed to unearth sufficient probative evidence, taking the evidence in the light most favorable to the non-moving party, on which a reasonable juror could conclude, based on a preponderance of the evidence standard, that Home City conspired to commit the predicate act of witness tampering in connection with this alleged "bribe."

IV. CONCLUSION

Although Home City pled guilty to committing certain antitrust violations in Southeastern Michigan, this is a RICO case in which an ex-employee of Arctic Glacier asserts that Home City was part of a different scheme to interfere with his cooperation with authorities and to retaliate against him for that cooperation. The two are separate alleged schemes, alleging distinct crimes with separate victims, as recognized by the Sixth Circuit in its crime victim ruling and as conceded by McNulty himself in the course of discovery in this case. *See supra* footnote 3. There is simply insufficient evidence produced in this case on which a reasonable juror could conclude that Home City committed two predicate acts in furtherance of this separate alleged RICO scheme to retaliate

against McNulty for cooperating with the government or to interfere with his cooperation. McNulty cannot simply claim "guilty there, therefore guilty here" to survive summary judgment on this separate and distinct RICO claim. The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its complaint to defeat the motion for summary judgment." *Petroleum Enhancer, LLC v. Woodward*, 690 F.3d 757, 772 (6th Cir. 2012) (quoting *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 246 (6th Cir. 2010)).

McNulty cannot meet his summary judgment "burden by relying on mere '[c]onclusory assertions, supported only by [his] own opinions.'" *Green*, 2016 WL 2586840, at *3 (quoting *Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008)) (second alteration added). McNulty was required to "show sufficient probative evidence, based 'on more than mere speculation, conjecture or fantasy' that would enable a jury to find in [his] favor." *Id.* (quoting *Arendale*, 519 F.3d at 601) (alterations added). There is insufficient evidence presented here, even viewing that evidence in the light most favorable to McNulty, on which a reasonable juror could find that Home City committed two predicate acts in furtherance of a RICO scheme either to tamper with McNulty or to retaliate against him for his cooperation with the government.

Ultimately the Court must ask whether reasonable jurors, without resort to conjecture or speculation, "could find by a preponderance of evidence that the plaintiff is entitled to a verdict" on McNulty's RICO claim. *Anderson*, 477 U.S. at 254. McNulty has not crossed that evidentiary threshold here with respect to Home City.[8]

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[9] Because the Court finds that McNulty has failed to establish a RICO violation, it does not address the issue of mitigation of damages.

Accordingly, the Court GRANTS Home City's motion to dismiss and DISMISSES Home City from this action WITH PREJUDICE.

IT IS SO ORDERED.

Paul D. Borman
United States District Judge

Dated: AUG 17 2016

Appendix “E”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN MCNULTY,

Plaintiff,

v.

ARCTIC GLACIER, INC., *et al.*,

Defendants.
_____/

Case No. 08-cv-13178

Paul D. Borman
United States District Judge

R. Steven Whalen
United States Magistrate Judge

OPINION AND ORDER
(1) GRANTING ARCTIC GLACIER AND CHARLES KNOWLTON'S MOTION TO DISMISS (ECF NO. 256),
(2) DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT (ECF NO. 250),
(3) DENYING AS MOOT (a) PLAINTIFF'S MOTION TO SEVER BANKRUPT DEFENDANTS (ECF NO. 249) and (b) PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY OF MONITOR (ECF NO. 276)

This action involves Plaintiff's claims that he was terminated from his employment for his refusal to participate in an alleged unlawful market allocation conspiracy among the three major packaged ice distributors named as Defendants in this action and his related claim that he was boycotted from employment in the packaged ice industry for acting as an informant for the government in its investigation into anti-competitive collusion in the packaged ice industry. Claims against the packaged ice distributors ultimately led to several guilty pleas, a multi-district antitrust action (MDL 1952, E.D. Mich. 2008) and to the bankruptcy of two of the three alleged co-conspirators, Arctic Glacier and Reddy Ice. Plaintiff now seeks to continue and expand the claims asserted in this action, including his claims against Arctic Glacier, one of the bankrupt Defendants

and Charles Knowlton, one of its former employees.

Before the Court are (1) the motion of the bankrupt Defendant Arctic Glacier and its former employee Charles Knowlton to dismiss based upon the ongoing bankruptcy proceedings, (2) Plaintiff's motion to amend the Complaint to reassert claims that were dismissed by this Court in 2009, (3) Plaintiff's motion to sever the bankrupt Defendant Arctic Glacier from the remaining non-bankrupt Defendants, and (4) Plaintiff's motion to preclude testimony in this case from the monitor overseeing Arctic Glacier's Canadian bankruptcy proceedings. The Court held a hearing on December 3, 2015. For the reasons that follow, the Court GRANTS Defendants Arctic Glacier and Knowlton's motion to dismiss, DENIES Plaintiff's motion to amend, and DENIES AS MOOT the Plaintiff's motions to sever and to exclude testimony of the monitor.

I. BACKGROUND

A. Plaintiff's Complaint and This Court's Previous Partial Dismissal Orders

Plaintiff Martin McNulty ("Plaintiff" or "McNulty") filed this action on July 23, 2008, alleging that Defendants Arctic Glacier Income Fund, Arctic Glacier, Inc., Arctic Glacier International Inc. ("Arctic Glacier"), Reddy Ice Holdings, Inc. and Reddy Ice Corporation ("Reddy Ice"), Home City Ice Company ("Home City"), Keith Corbin, Charles Knowlton and Joseph Riley were involved in an unlawful conspiracy and enterprise to (1) terminate Plaintiff from Arctic Glacier for refusing to participate in an unlawful market allocation scheme and (2) to boycott Plaintiff from employment in the packaged ice industry.

This Court has summarized Plaintiff's claims in a previous Order as follows:

> Plaintiff, a former packaged ice salesperson, was an employee of Arctic Glacier International, Inc., the wholly-owned subsidiary of Arctic Glacier, Inc., which is the wholly-owned subsidiary of Arctic Glacier Income Fund. These three companies are collectively referred to as "Arctic Glacier." Plaintiff alleges that while he was

employed by Arctic Glacier, he discovered that Arctic Glacier was involved in a market allocation scheme with Home City Ice Company ("Home City"). Upon questioning Keith Corbin, a former vice president of sales for Arctic Glacier, about the market allocation scheme between Arctic Glacier and Home City, Mr. Corbin allegedly informed him that Arctic Glacier had the same market allocation arrangement with Reddy Ice Holdings, Inc. and Reddy Ice Corporation (collectively, "Reddy Ice"). Plaintiff alleges that he refused to participate in the market allocation scheme and that as a result, Arctic Glacier terminated him.

Shortly following his termination from Arctic Glacier, Plaintiff signed an agreement with Arctic Glacier, titled "FULL AND FINAL RECEIPT, RELEASE, DISCHARGE AND NON–COMPETITION AGREEMENT" ("Release"). In addition to containing a six month non-compete clause, the Release provides that in consideration of a severance payment, Plaintiff agreed not to sue Arctic Glacier or its employees with respect to any claims that he has prior to or as of the time that he signed the Release. During the pendency of the non-compete period, Plaintiff informed the federal government of alleged collusion among his former employer, Arctic Glacier, and Home City and Reddy Ice, and began working with federal authorities on the matter, including the Federal Bureau of Investigation ("FBI") and the Department of Justice.

After the non-compete period expired, Plaintiff alleges that he actively began looking for employment with manufacturers and distributors of packaged ice; his only promising lead was from Tropic Ice Company ("Tropic Ice"), which was later acquired by Arctic Glacier. Joseph Riley, the President of Tropic Ice agreed to meet with Plaintiff to discuss his application for employment. During the meeting, Mr. Riley informed Plaintiff, who allegedly was wearing a recording device provided to him by the FBI, that Arctic Glacier and its co-conspirators in the market allocation scheme had all agreed not to hire Plaintiff—specifically, that Plaintiff was being "blackballed" from the industry. Mr. Riley also informed Plaintiff that Tropic Ice had also been conspiring with Arctic Glacier to allocate markets. Despite this, Plaintiff alleges that Mr. Riley told him that he would call him to discuss Plaintiff's potential employment with Tropic Ice. After Mr. Riley never called Plaintiff, Plaintiff called him and was told that Tropic Ice had agreed with Arctic Glacier that it would not hire Plaintiff.

On July 23, 2008, Plaintiff filed the instant suit against Reddy Ice, Arctic Glacier, Home City, Mr. Corbin, Mr. Knowlton, and Mr. Riley (collectively "Defendants"), alleging, inter alia, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO").

McNulty v. Reddy Ice, No. 08-13178, 2009 WL 2168231, at *1-2 (E.D. Mich. July 17, 2009).

In response to an initial round of motions to dismiss Plaintiff's original Complaint, Plaintiff filed an Amended Complaint on December 2, 2008. (ECF No. 43, Amended Complaint.) Plaintiff's Amended Complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. ("RICO"); the Sherman Act, 15 U.S.C. § 1; the Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.772; and common law tortious interference with prospective business advantage. Defendants responded to Plaintiff's Amended Complaint with renewed motions to dismiss. (ECF Nos. 54-59.) On May 29, 2009, this Court issued an initial Opinion and Order Granting in Part and Denying Part Defendants' Motions to Dismiss. *McNulty v. Reddy Ice Holdings,* No. 08-13178, 2009 WL 1508381, at *1 (E.D. Mich. May 29, 2009). The Court dismissed Plaintiff's Sherman Act and state law antitrust claims, concluding that Plaintiff had failed to allege antitrust injury sufficient to confer standing to maintain his antitrust claims:

> Of the various requirements for establishing antitrust standing, the one primarily at issue here is antitrust injury, "which is a 'necessary, but not always sufficient,' condition of antitrust standing." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007). Antitrust injury is an "injury the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Valley Prods. Co., Inc. v. Landmark*, 128 F.3d 398, 402 (6th Cir. 1997) (citing *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc*., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)).The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id*. This requirement "ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).
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> Plaintiff's Amended Complaint clearly states that the relevant market is the market for packaged ice sales representatives. Instead of alleging an anticompetive effect on that market, however, Plaintiff—under the heading "The Anticompetitive Effects of the Defendants' Termination and Boycott of [Plaintiff]"—merely alleges that the group boycott injured him personally. His Complaint does not mention any injury to the packaged ice sales market as a result of the alleged group boycott against him. Precedent from this Circuit clearly instructs that an antitrust plaintiff must allege not

> only an injury to himself but also an injury to the relevant market. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (affirming dismissal of a complaint on antitrust injury grounds that alleged a similar "group boycott" of an employee); *see also Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000). Because Plaintiff has not alleged an anticompetive effect on the market for packaged ice sales representatives, his antitrust claim must fail.

2009 WL 1508381, at *18, 21. The Court also dismissed Plaintiff's RICO claim against Home City, Reddy Ice, Corbin and Riley and dismissed Plaintiff's tortious interference claim against all Defendants except Arctic Glacier. *Id*. at *24.

On July 17, 2009, in response to Plaintiff's motion for reconsideration, this Court issued an Order reversing in part its May 29, 2009 Order, reinstating Plaintiff's RICO claim against certain Defendants based upon the Supreme Court's intervening decision in *Boyle v. United States*, 556 U.S. 938 (2009), which eased somewhat the threshold standard for pleading a RICO enterprise. *McNulty v. Reddy Ice Holdings*, No. 08-13178, 2009 WL 2168231 (E.D. Mich. July 17, 2009). On reconsideration in light of *Boyle*, the Court reinstated Plaintiff's RICO claim against Home City, Reddy Ice and Joseph Riley. *Id*. at *5. Taken together, the Court's rulings thus allowed for the following claims to proceed:

> (1) RICO claims under § 1692(c) against Arctic Glacier, Home City, Reddy Ice, Charles Knowlton and Joseph Riley based upon an alleged pattern of racketeering activity limited to the predicate acts of witness tampering and witness retaliation squarely directed at Plaintiff ("As alleged, and as limited by the Release, the RICO enterprise consisting of Arctic Glacier, Home City, Reddy Ice and Mr. Riley was to boycott Plaintiff from employment in the packaged ice industry in order to [dissuade] Plaintiff from cooperating with government officials and to punish Plaintiff for actually doing so." 2009 WL 2168231, at *5);[1] and

[1] In its May 29, 2009 Order, the Court dismissed all claims against Corbin and Corbin remains dismissed from this case. 2009 WL 1508381, at *6. Therefore, the Court need not and will not address in this Opinion any of Plaintiff's arguments regarding the continued viability, or amendment, of claims in this Court against Corbin. In any event, any past, present or future claims against Corbin that would relate to Plaintiff's claims in this action have been released, discharged

> (2) Tortious interference with prospective economic advantage against Arctic Glacier only ("Plaintiff has not alleged any facts demonstrating that any of the Defendants besides Arctic Ice interfered with an employment expectancy that Plaintiff allegedly had with a third party." 2009 WL 1508381, at *24).

Following the Court's rulings on the Defendants' motions to dismiss, the parties engaged in discovery, appealing to the Court in several instances to resolve discovery disputes throughout 2009-2011. During this same time, the Department of Justice ("DOJ") conducted a criminal investigation into the packaged ice industry, which resulted in several guilty pleas from some of the Defendants in this action. In January, 2012, this Court ordered that Plaintiff be given access to certain recordings that the DOJ had obtained in the course of its investigation, several of which were recordings that were made by the Plaintiff in his role as a cooperating government witness. (ECF No. 127, Order Granting Plaintiff's Motion for Equal Access to Recordings and Transcripts.)

On February 24, 2012, Arctic Glacier filed a Notice of Bankruptcy Filing (ECF No. 233). On April 13, 2012, Reddy Ice filed its Notice of Bankruptcy Filing (ECF No. 234).

Significantly, Plaintiff took no action in this case between February, 2012 and April, 2015, when Plaintiff filed a Stipulated Dismissal of Defendant Reddy Ice (ECF No. 248) and contemporaneously filed the motions to sever and for leave to amend his complaint that are presently before the Court.

B. Plaintiff's Claim Filing in Arctic Glacier's Bankruptcy Proceedings

Arctic Glacier commenced its bankruptcy proceedings on February 24, 2012 under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"), before the Canadian Court in Winnipeg, Canada, File No. CI 12-01 76323 (the "Canadian Proceeding").

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and enjoined for the reasons discussed *infra* in Section IIB.

The United States Bankruptcy Court for the District of Delaware, Chief United States Bankruptcy Judge Kevin Gross (the "U.S. Bankruptcy Court"), recognized the Canadian Proceeding as the "foreign main proceeding." (ECF No. 256, Defs.' Mot. to Dismiss Ex. B, Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief ¶ 8.) In its Recognition Order, the U.S. Bankruptcy Court enjoined "all entities" other than the Foreign Representative from "the commencement or continuation . . . of a judicial . . . proceeding . . . in any way related to, or that would interfere with, the administration of the Debtors' estates in the Canadian Proceeding . . . ." *Id*. ¶ 9(b).

Arctic Glacier's insolvency proceedings have culminated in a plan of reorganization that has been approved by both the Canadian and U.S. Bankruptcy Courts. First, by Order dated September 5, 2014, the Canadian Court, Madam Justice Spivak, approved and sanctioned a Consolidated Plan of Compromise and Arrangement of the Debtors, as amended and restated on August 26, 2014 and January 21, 2015 (the "CCAA Plan"). (Defs.' Mot. Ex. C, the "Sanction Order"). Second, by Order dated September 16, 2014, the United States Bankruptcy Court in Delaware recognized and gave full force and effect in the United States to the Canadian Sanction Order. (Defs.' Mot. Ex. D, United States Recognition Order.) The CCAA Plan became effective on January 22, 2015, the "Plan Implementation Date."[2] Both of these Orders were issued pursuant to Motions by Alvarez & Marsal

[2] As discussed *infra* in Section IIA, this Court addresses Defendants' motion to dismiss as in the nature of a jurisdictional challenge and thus has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts. Even if this Court were to review the motion under Fed. R. Civ. P. 12(b)(6), as Defendants suggest, or under Fed. R. Civ. P. 12(c), as Plaintiff suggests, the Court would take judicial notice of the documents issued in the Canadian and U.S. Bankruptcy Proceedings, on which both parties necessarily rely in setting forth their arguments. "In determining whether the affirmative defense of discharge in bankruptcy applies, it is appropriate to look not only to the face of the complaint, but also to public documents related to [the] bankruptcy proceedings, of which judicial notice is hereby

Canada Inc., in its capacity as the court-appointed monitor and authorized foreign representative for the Arctic Glacier insolvency proceedings (the "Monitor"), that were served on Plaintiff's counsel in August, 2014. Plaintiff's counsel Daniel Low was served with the Notice of Motion for Plan Sanction Order on August 26, 2014. (ECF No. 256, Ex. E; Ex. G, at 7, PgID 6344.) Mr. Low's longtime co-counsel in this action, Andrew Paterson, was served with the Notice of Motion for an Order Recognizing and Enforcing Order of Canadian Court Sanctioning and Approving CCAA Plan (ECF No. 256, Ex. F PgID 6254, ECF No. 257, Amended Exhibit H, at 9, PgID 6451.) Mr. Low also was served with a copy of the Monitor's Fifteenth Report, which explained the CCAA Plan, including a provision, ¶ 9.1, releasing certain third party claims. (ECF No. 256, Ex. N at 13, PgID 6431.)

The CCAA Plan, a copy of which was attached to both the Plan Sanction and Recognition Motions that were served on Plaintiff's counsel, provides that claims against Arctic Glacier and its present and former employees who filed or could have filed an indemnity claim against an Arctic Glacier party are forever released:

> On the Plan Implementation Date and in accordance with the sequential steps and transactions set out in Section 8.3 of the Consolidated CCAA Plan, the Arctic Glacier Parties, the Monitor, Alvarez and Marsal Canada Inc. and its affiliates, the CPS, the Trustees, the Directors and the Officers, each and every present and former employee who filed or could have filed an indemnity claim or a DO&T Indemnity Claim against the Arctic Glacier Parties, each and every affiliate, subsidiary, member (including members of any committee or governance council), auditor, financial advisor, legal counsel and agent thereof and any Person claiming to liable

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taken." *Compliant Rx Solutions, Inc. v. XO Commun.*, No. 05-cv-676, 2006 WL 999971, at *2 (E.D. Pa. April 13, 2006). Documents from those proceedings are publicly available on the Canadian Monitor's website, which contains direct links to documents filed in both the Canadian and United States Bankruptcy Proceedings. http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries .

> derivatively through any or all of the foregoing Persons (the "Releasees") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any person may be entitled to assert . . . whether known or unknown . . . existing or hereinafter arising . . . that are in any way related to, or arising out of or in connection with the claims, the Arctic Glacier Parties' business and affairs . . . the Consolidated CCAA Plan, the CCAA Proceedings, any Claim that has been barred or extinguished pursuant to the Claims Procedure Order or the Claims Officer Order (excepting only Releasees in respect of Unresolved Claims, unless and until such Unresolved Claims become Proven Claims in accordance with the Claims Procedure Order and the Claims Officer Order), and all claims arising out of such actions or omissions shall be forever waived and released . . . .

CCAA Plan ¶ 9.1. Paragraph 27 of the Sanction Order provides that "any and all Persons . . . are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings . . . against any Releasee in respect of all Claims . . . ." ECF No. 256, Ex. C, Sanction Order ¶ 27. Paragraph 29 of the Sanction Order likewise provides that "all Persons shall be permanently and forever barred, estopped, stayed and enjoined . . . from . . . commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Releasees . . . ." *Id.* ¶ 29. The U.S. Bankruptcy Court, in its September 16, 2014 Order Recognizing and Enforcing Order of Canadian Court Sanctioning and Approving CCAA Plan, reiterates the exact terms of ¶ 9.1 of the CCAA Plan, including the language that defines "Releasees" to include "each and every present and former employee who filed or could have filed an indemnity claim." ECF No. 256, Ex. D, U.S. Recognition Order ¶ 5. The U.S. Recognition Order then adopts the same injunction set forth in ¶ 29 of the Sanction Order, permanently and forever barring all persons from commencing or continuing in any

manner any action or suit against the ¶ 9.1 Releasees. *Id*. ¶ 6. Finally, the U.S. Recognition Order expressly "retain[s] jurisdiction with respect to all matters relating to the interpretation or implementation of this Order." *Id*. ¶¶ 12.

With respect to Claims that were timely filed in the Canadian proceedings, the U.S. Bankruptcy Court has recognized and given full force and effect to the Claims Procedure Order and the Claims Officer Order that govern the processing of such Claims. (ECF No. 270, Defs.' Reply, Ex. A, Claims Procedure Order; Ex. B, Claims Officer Order; Ex. C, Claims Procedure Recognition Order; Ex. D, Claims Officer Recognition Order.) The Delaware U.S. Bankruptcy Court expressly "retain[s] jurisdiction with respect to all matters relating to the interpretation or implementation" of its Recognition Orders. *Id*. Exs. C, D ¶¶ 5, 7 respectively.

Significantly, Plaintiff McNulty filed a Schedule "C" Claim against Arctic Glacier in the Canadian Proceedings on October 12, 2012. (ECF No. 269, Pl.'s Resp. to Mot. to Dismiss, Ex. 3.) McNulty's Schedule C Claim seeks damages of $13.61 million ($4.17 million in lost lifetime earnings subject to mandatory statutory trebling, plus statutory attorneys' fees and expenses). *Id*. As supporting documentation for his Claim, McNulty attached his December 2008 Amended Complaint in this action. *Id*. McNulty is actively pursuing that Claim, which has been designated as an "Unresolved Claim" under the Canadian Claims Procedure, and the Monitor has established a reserve of $14.1 for the McNulty Claim. Pursuant to the CCAA, an "Unresolved Claim" is defined as "an Affected Claim, in an amount specified in the corresponding Proof of Claim, that has not been finally determined as a Proven Claim . . . ." *Id*. (ECF No. 269, Pl.'s Resp. Ex. 2, CCAA Plan ¶ 1.1.) An "Affected Claim" is defined under the CCAA as "any Claim or DO&T Claim that is not an Excluded Claim." *Id*. The CCAA further defines a "Claim" to mean "any right or claim of any

Person . . . that may be asserted in whole or in part against an Arctic Glacier Party." *Id*. As defined in Footnote 1 on McNulty's Claim Form, "Arctic Glacier Parties" includes a list of corporate entities. (ECF No. 269, Pl.'s Resp. Ex. 3.) The list of "Arctic Glacier Parties" does not include a reference to individual directors, officers, trustees or employees of Arctic Glacier. In fact, a *separate* claim form was required for claims against directors, officers or trustees of an Arctic Glacier entity and McNulty *did not* file a "DO&T Claim," defined in the CCAA as "any right or claim of any Person that might have been asserted or made in whole or in part against one or more Directors, Officers or Trustees" of Arctic Glacier," against either Corbin or Knowlton. DO&T Claims were to be filed on a Schedule "D" Claim Form for claims against Directors, Officers or Trustees of the Arctic Glacier Parties. (ECF No. 270, Ex. A, Claims Procedure Order, Schedule "D", PgID 8456.) McNulty thus has an "Unresolved Claim" against Arctic Glacier, but has not filed a "DO&T Claim," and therefore has filed no separate Claim at all, against any officers or directors or trustees.[3]

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[3] As discussed *infra*, McNulty claims that his Unresolved Schedule C Claim against Arctic Glacier also includes his claims against Corbin and Knowlton. This is a matter for the Canadian Bankruptcy Court, and following that the Delaware United States Bankruptcy Court, to determine, not this Court. Also, as discussed *infra*, regardless of whether McNulty has an Unresolved Claim against Arctic Glacier and McNulty, they are Releasees under the Plain and the claims against them in this action are forever discharged, released and enjoined. In any event, McNulty's position, one that he has vigorously asserted in the Canadian Bankruptcy proceedings and has reiterated here in this Court, that he in fact already has an "Unresolved Claim" against Corbin and Knowlton in the Canadian proceeding by virtue of filing his Schedule C Claim against Arctic Glacier, would absolutely preclude any attempt to also pursue those same claims against Knowlton in this Court. The CCAA Plan is clear that all "Unresolved Claims" are to be "finally determined" according to the Claims Order Procedure, CCAA Plan ¶ 7.3, which most certainly does not allow for any involvement of or review by this Court. McNulty's litigation position in the Canadian proceedings, as reiterated in this Court, that he has perfected an Unresolved Claim against Arctic Glacier and Knowlton in the bankruptcy proceedings further establishes that he cannot pursue those claims here. This, standing alone, is sufficient basis to grant Defendants' motion to dismiss. *See infra* discussion at IIB2.

Under the CCAA, Unresolved Claims are to "be finally determined in accordance with the Claims Procedure Order and the Claims Officer Order." CCAA Plan ¶ 7.3. Paragraph 45 of the CCAA Plan provides that in the event that disputed claims are not resolved in a timely manner, the Monitor shall apply to the Canadian Bankruptcy Court for direction. CCAA Plan ¶ 45. On March 5, 2013, as directed under ¶ 45, the Monitor filed a motion in the Canadian Bankruptcy Court seeking the appointment of a claims officer to adjudicate disputed claims that could not be resolved consensually. On March 7, 2013, the Canadian Bankruptcy Court, Madam Justice Spivak, issued the Monitor's requested Claims Officer Order appointing Jack Ground as the Claims Officer for disputed claims. On May 7, 2013, the Delaware U.S. Bankruptcy Court recognized and gave full effect to the Claims Officer Order. (Orders available on the Alvarez website, *see supra* n. 2.)

Thus, Plaintiff McNulty has been vigorously pursuing his Unresolved Claim in the Canadian bankruptcy proceedings, which initially was denied, but subsequently was referred to Claims Officer Jack Ground for final adjudication. In its Thirteenth Report, the Monitor observed the following regarding the McNulty Claim:

> [T]he Monitor received a Proof of Claim from Martin McNulty, a former employee of the Applicants, in the amount of $13.61 million (the "McNulty Claim"). The McNulty claim related to outstanding litigation against the Applicants, Reddy Ice, Home City and certain former employees of the Applicants, pending in the Michigan Court. In the litigation and in the McNulty Claim, Mr. McNulty alleges that AGIF, AGI, and AGII engaged in an unlawful conspiracy and enterprise with certain individuals and competing distributors of packaged ice to boycott his employment in the packaged ice industry (the tortious interference with prospective economic advantage claim). Mr. McNulty also alleges that the named Arctic Glacier Parties violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"), by allegedly blackballing him from finding employment in the packaged ice industry in retaliation for his cooperation with the authorities in their investigations of the industry, as well as offering Mr. McNulty bribes to stop cooperating with the government (the RICO claim).

> As set out in paragraphs 3.14 and 3.15 of the Twelfth Report, in order to evaluate the McNulty Claim, the Monitor required access to certain information and materials subject to protective orders issued by the Michigan Court. On April 30, 2013, the Monitor's motion to intervene in the McNulty litigation was filed, along with a joint motion of the Monitor and the Applicants to modify the necessary protective orders. On June 4, 2013, the Michigan Court granted the relief requested, such that the Monitor (and its outside counsel), any Claims Officer, the CPS, and this Court, if necessary, were and are permitted to view the information subject to protective orders in the McNulty litigation.
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> The Applicants subsequently provided to the Monitor and its counsel certain additional information that was previously subject to the protective orders. After consulting with the CPS on behalf of the Applicants, as required by the Claims Procedure Order, the Monitor issued a Notice of Disallowance with respect to the McNulty Claim on September 12, 2013. The Monitor disallowed the McNulty Claim in its entirety because the evidence available to the Monitor does not support Mr. McNulty's allegations.
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> On September 19, 2013, in accordance with the Claims Procedure Order, Mr. McNulty filed a Dispute Notice with the Monitor. . . . In accordance with the Claims Procedure Order and the Claims Officer Order, the Monitor intends to explore whether a consensual resolution of the McNulty Claim can be achieved. Should a consensual resolution not be achievable in the near term, the Monitor intends to refer the dispute raised in Mr. McNulty's Notice of Dispute to a Claims Officer.

Thirteenth Report of the Monitor at 16-18 (Monitor's Reports available on the Alvarez website, *see supra* n. 2.)

The Monitor ultimately concluded that a consensual resolution could not be achieved "within a satisfactory time period or in a satisfactory manner" and, in "accordance with the Claims Officer Order, on November 22, 2013, [] referred the McNulty Claim to a Claims Officer, the Honourable Jack Ground, for adjudication." Fifteenth Report of the Monitor at 11.

McNulty objected to the reference of his Claim to Claims Officer Ground for adjudication and, on December 3, 2013, wrote to Claims Officer Ground asking him to decline hearing the Claim because McNulty believed that his Claim "should be resolved in the United States by an adjudicator familiar with the applicable U.S. law, among other reasons." Fifteenth Report of the Monitor at 11-

12. The Monitor responded to McNulty's objection on December 6, 2013, explaining that while reference to Claims Officer Ground was proper, the Monitor would explore further efforts at consensual resolution. *Id*. at 12. The Monitor, counsel for the Monitor, counsel for McNulty and counsel for the Arctic Glacier Parties participated in conference calls to agree upon a case management procedure but, as no such procedure was agreed to, the Monitor wrote to Jack Ground to discuss a timetable and steps for adjudication of the McNulty Claim. *Id*. at 12.

On September 12, 2014, McNulty filed a motion in the Canadian Bankruptcy Court seeking to strike the appointment of Jack Ground as a Claims Officer to adjudicate the McNulty Claim, claiming that the Claims Procedure Order had not been followed with regard to reference of his claim for adjudication and also raising a concern about bias of Jack Ground based upon his affiliation some 23-years prior with the law firm of the current Monitor's counsel. *See* Eighteenth Report of the Monitor, 12-13, ¶¶ 4.29, 4.33. Madam Justice Spivak denied McNulty's motion to strike Jack Ground, (1) finding incredible McNulty's claim of lack of notice of the Monitor's Motion to Appoint a Claims Officer, (2) concluding that the Claims Procedure Order did not require the Monitor to consult with a claimant before referring his claim to a Claims Officer and (3) finding no basis whatsoever for a finding that Jack Ground's 23-years prior affiliation with the Monitor's counsel's law firm would lead him to favour his former firm's client. *See* Twenty-First Report of the Monitor at 5-7, Ex. E, November 26, 2014 Decision of The Queen's Bench, CI12-01-76323, at 5-8; Transcript of November 26, 2014 Decision, available on Alvarez website "Orders." Madam Justice Spivak also rejected McNulty's argument that his Claim should be determined by a United States lawyer, noting that Officer Ground was quite capable of acquiring the relevant United States law with appropriate expert opinion and also observing that McNulty's claim, involving primarily

credibility assessments, factual findings and inferences from those facts, was not of the particularly complex type that would require a United States adjudicator. *Id*. at 9. Madam Spivak further observed that McNulty's Claim arose in the context of a CCAA proceeding, with a streamlined process for resolution that respected the rights of all interested parties and the timing of the distribution of the estate. *Id*. at 10. Madam Justice Spivak urged the parties to move the McNulty Claim forward by bringing the matter back before Claims Officer Ground as soon as possible. *Id*.

In February, 2015, in consultation with Claims Officer Ground, the parties agreed to participate in a Judicially Assisted Dispute Resolution mediation session ("JADR") with the assistance of a Judge of the Canadian Court in Winnipeg. Twenty-First Report of the Monitor at 7. The JADR session took place on April 29, 2015 but did not lead to a settlement. Twenty-Second Report of the Monitor ¶ 9.8.

On March 13, 2015, McNulty filed a motion for leave to amend his Claim in the Claim adjudication with Claims Officer Ground, seeking to add an antitrust claim. *Id*. Officer Ground received briefing from both parties and permitted McNulty to amend his Claim. May 27, 2015 Twenty-Second Report of the Monitor ¶ 9.9. *See also* ECF No. 267, Pl.'s Sealed Reply in Support of Mot. for Leave to Amend, Exs. M and N, briefing in CCAA proceeding and Decision of Officer Ground permitting amendment of McNulty Claim. As a result of the amendment to the McNulty Claim, the parties have been engaged in negotiations in the Claims adjudication process regarding the scope of discovery and have sought direction from Officer Ground. November 9, 2015 Twenty-Third Report of the Monitor ¶ 6.8.

Meanwhile, McNulty filed his motions to amend and to sever in this Court on April 13, 2015. "[T]he Monitor is of the view that McNulty's filing of the McNulty Michigan Motions violates the

Plan, the Sanction Order, and the U.S. Recognition Order." Twenty-Third Report of the Monitor ¶ 6.10. In the Monitor's view, both Corbin and Knowlton were beneficiaries of the Release set forth in ¶ 9.1 of the Plan because both Corbin and Knowlton were former employees who did or could have filed indemnification claims against the debtor. Twenty-First Report of the Monitor ¶ 4.4. The Monitor explained that Corbin had filed an indemnification claim and that Knowlton, although he did not file an indemnification claim, could have done so and had been indemnified for his attorneys' fees. *Id*. The Monitor is of the view that continuation of the claim in this (Michigan) Court against Arctic Glacier is an impermissible collateral attack on the Plan, the Sanction Order and the U.S. Recognition Order, because the McNulty Claim against Arctic Glacier is being addressed through the Claims Procedure, with appeal rights to the Canadian Bankruptcy Court and ultimate jurisdiction regarding the implementation of the Claims Procedure Order lying with the Delaware U.S. Bankruptcy Court. Twenty-First Report of the Monitor ¶¶ 4.1-4. As discussed *infra*, this Court agrees.

II. DEFENDANTS' ARCTIC GLACIER AND KNOWLTON'S MOTION TO DISMISS

A. Standard of Review

Defendants Arctic Glacier and Knowlton move to dismiss McNulty's claims against them, but their motion failed to cite the Federal Rule of Civil Procedure under which they move. When asked at the hearing to clarify the rule under which they seek relief, counsel was unsure and asked for the opportunity to address the issue in a supplemental filing. Post-hearing briefing did little to clarify the issue, with Defendants continuing to urge the Court to apply Rule 12(b)(6), despite the fact that every Defendant in this case has filed an answer to the Complaint. *See* ECF No. 280. "[A] post-answer Rule 12(b)(6) motion is untimely and the cases indicate that some other vehicle, such

as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the plaintiff's failure to state a claim for relief." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004).

Plaintiff, citing the inapplicability of Rule 12(b)(6), argues that the Court should treat the motion as one for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *See* ECF No. 281. Fed. R. Civ. P. 12(h)(2) permits a motion under 12(c) for certain 12(b) defenses, including failure of the complaint to state a claim. Fed. R. Civ. P. 12(h). "In this context, Rule 12(c) is merely serving as an auxiliary device that enables a party to assert certain procedural defenses after the close of the pleadings." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (3d ed. 2005). "Motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are analyzed under the same de novo standard as motions to dismiss pursuant to Rule 12(b)(6)." *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008) (citing *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 697 (6th Cir. 2005)). "[T]he legal standards for adjudicating Rule 12(b)(6) and Rule 12(c) motions are the same . . . ." *Lindsay v. Yates*, 498 F.3d 434, 437 n. 5 (6th Cir. 2007). When reviewing a motion to dismiss under Rule 12(b)(6) or 12(c), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id*. (quoting *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). A plaintiff's factual allegations, while "assumed to be true, must do more than create speculation or

suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 127 S.Ct. at 1965). Thus, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Bredesen*, 500 F.3d at 527 (citing *Twombly*, 127 S.Ct. at 1969).

Plaintiff argues that because the motion is one for judgment on the pleadings, the Court must limit its consideration of documents and evidence outside the pleadings. "As a general rule, matters outside the pleadings may not be considered in ruling on a 12(b)(6) motion to dismiss unless the motion is converted to one for summary judgment under Fed. R. Civ. P. 56." *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997). However, in ruling on a motion to dismiss, the Court may consider in addition to the Complaint, the following, without converting the motion to one for summary judgment: (1) documents that are referenced in the plaintiff's complaint or that are central to plaintiff's claims (2) matters of which a court may take judicial notice (3) documents that are a matter of public record and (4) letters that constitute decisions of a government agency. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). *See also Greenberg v. Life Ins. Co. Of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (finding that documents attached to a motion to dismiss that are referred to in the complaint and central to the claim are deemed to form a part of the pleadings); *Jackson v, City of Columbus*, 177 F.3d 507, 745 (6th Cir. 1999), abrogated on other grounds by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2000). *See also Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) ("When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long

as they are referred to in the Complaint and are central to the claims contained therein."); *Klais*, 108 F.3d at 89. Plaintiff argues that documents from Arctic Glacier's bankruptcy proceedings relied upon by the Defendants in their motion are central to Defendants' defense, and not to Plaintiff's claims, and apparently objects to the Court's reliance on those documents in resolving the motion. Certain affirmative defenses, however, (including discharge in bankruptcy) can be resolved on a motion to dismiss if the facts establishing the defense are not in dispute. *Compliant Rx Solutions, Inc. v. XO Commun.*, No. 05-cv-676, 2006 WL 999971, at *2 (E.D. Pa. April 13, 2006). "[A] complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense [] appears on its face." *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994) (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357).

The Court concludes that the challenge presented in Defendants' motion, which in essence asks this Court to decline to continue exercising jurisdiction over McNulty's claims against them due to the Orders and proceedings in the Arctic Glacier bankruptcy, is jurisdictional in nature and does not fit readily within the analytical framework for a motion to dismiss for failure to state a claim. In fact, the substantive merits of Plaintiff's RICO and tortious interference claims are not at issue at all in Defendants' motion. In *Pratt v. Ventas, Inc.*, 365 F.3d 514 (6th Cir. 2004), the Sixth Circuit recognized that a similar collateral attack on an order of the Florida bankruptcy court, although addressed by the district court under Rule 12(b)(6), was in fact "jurisdictional in nature." *Id*. at 523.

A possible analytical model for such a jurisdictional inquiry is Fed. R. Civ. P. 12(b)(1), which provides the framework for analyzing an attack on the Court's subject matter jurisdiction. Challenges to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) "come in

two varieties: a facial attack or a factual attack." *Gentek Bldg. Prod., Inc. v. Sherwin–Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a Rule 12(b)(6) motion. *Gentek*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). Under a factual attack, however, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction. "Where the defendant brings a factual attack on the subject matter jurisdiction, no presumption of truth applies to the allegations contained in the pleadings, and the court may consider documentary evidence in conducting its review." *Id*. "If the district court must weigh conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist, it has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id*.

But Defendants' motion does not fit neatly into either of the types of 12(b)(1) challenges, as it does not directly challenge the facial sufficiency of Plaintiff's Complaint or the factual basis of the claims pleaded in the Complaint. In *In re Daewoo Motor Co. Ltd., Dealership Litig.*, No. MDL-1510, 2005 WL 8005218, at *3-4, n. 11-12 (M.D. Fla. Jan. 6, 2005), the court was faced with a similar motion challenging a collateral attack on an order or ruling of a bankruptcy court under Fed. R. Civ. P. 12(b)(6). While recognizing the imperfect fit of a Rule 12(b)(1) analysis, the court nonetheless found the collateral attack sufficiently "analogous to a factual attack on the Court's subject matter jurisdiction" to warrant review under the 12(b)(1) factual attack standard:

> [B]ecause the Court finds that Plaintiffs' claims represent a collateral attack on the Korean bankruptcy proceedings . . . the issues surrounding the dismissal of Plaintiffs' claims are, in essence, jurisdiction related, and thus the Court's review and the burden on the parties vary from a Rule 12(b)(6) standard. By raising issues of comity, and seeking to have the case dismissed on that ground, Defendants recognize that this Court has jurisdiction over the subject matter, but ask that the Court, in its

> discretion, choose not to exercise that jurisdiction. In short, Defendants ask the Court to abstain from deciding the case. . . Thus, because the Court finds that the issues are more closely related to a motion to dismiss on jurisdictional grounds than on Rule 12(b)(6) grounds, the Court finds it more appropriate to utilize a Rule 12(b)(1) approach.

2005 WL 8005218, at *3. The court then noted, as is true in this Court as well, that under such a review the Court is not limited in its review to the face of Plaintiffs' Complaint and may consider any evidence for purposes of resolving disputes related to its jurisdiction. *Id*. at *4.

This Court finds that it is being asked to decide whether it has the power to continue to adjudicate McNulty's claims against Arctic Glacier and Knowlton in this Court when Orders of the Canadian and U.S. Bankruptcy Courts have either released McNulty's claims against them or rendered those claims subject to the exclusive jurisdiction of the Canadian and Delaware U.S. Bankruptcy courts. In deciding such an issue, the Court clearly has the authority to, and indeed must, look outside the four corners of Plaintiff's Complaint in this action and beyond those matters that are referred to or are central to Plaintiff's Complaint. Because the Court considers its review of Defendants' motion to be "jurisdictional in nature," *see Pratt*, 365 F.3d at 523, the Court is not constrained in its review of evidentiary matters outside the pleadings.[4] Indeed, Plaintiff concedes as much when he relies solely on statements made by the Canadian Monitor in his Fifteenth Report to support his argument that the claims in this action against Knowlton were not released in the bankruptcy proceedings; Defendants of course rely on the Orders and Reports issued in those

[4] In fact, even if this Court were to analyze the motion under Fed. R. Civ. P. 12(c), it would be "appropriate to look not only to the face of the complaint, but also to public documents related to [Arctic Glacier's] bankruptcy proceedings, of which judicial notice [can be] taken." *Compliant RX*, 2006 WL 999971, at *2. Unlike the situation faced by the Court in *Compliant RX*, a review of the public records related to the bankruptcy proceedings in this case conclusively resolves any claimed factual disputes that have been raised by Plaintiff.

proceedings in their motion to dismiss.

B. McNulty's Claims Against Arctic Glacier and Knowlton Were Either Released In, or Are Subject to the Exclusive Jurisdiction of, the Canadian and Delaware United States Bankruptcy Courts and Are No Longer Properly Before This Court

Under the plain language of the CCAA Plan, both Arctic Glacier and Knowlton are "Releasees," and the claims asserted against them in this action in this Court have been released, discharged, and enjoined by the Orders of the Canadian and Delaware United States Bankruptcy Courts. Those Orders, to which McNulty never objected in the bankruptcy proceedings, cannot be attacked collaterally in this Court.

Additionally, while the CCAA Plan allows for certain "Unresolved Claims," a term strictly defined in the CCAA Plan, to proceed against a Releasee through the Claims Procedures approved by the Canadian and United States Bankruptcy Courts, such claims must be "finally resolved" through the bankruptcy procedures for "Unresolved Claims." To the extent that McNulty has an "Unresolved Claim," if ultimately he is dissatisfied with the outcome of the Claims Procedure in the Canadian courts, he can appeal to the Delaware United States Bankruptcy Court, thereafter to the Delaware United States District Court and then to the United States Court of Appeals for the Third Circuit. McNulty cannot collaterally attack that outcome or the process that led to that outcome in this Court.

For these reasons, as explained more fully below, Arctic Glacier and Knowlton are entitled to dismissal of Plaintiff's claims against them in this Court.

1. Under the CCAA Plan, McNulty's claims in this Court against Arctic Glacier and Knowlton have been released, discharged and enjoined by Orders issued in the Arctic Glacier bankruptcy proceedings.[5]

Under the terms of the CCAA Plan that has been approved by the Canadian and United States Bankruptcy Courts as discussed *supra*, as of January 22, 2015, the Plan Implementation date, "the Arctic Glacier Parties . . . [and] each and every present and former employee who filed or could have filed an indemnity claim or DO&T Indemnity Claim against the Arctic Glacier Parties . . . (the "Releasees") . . . [were] released and discharged from any and all . . . claims, actions, causes of action, counterclaims, suits . . . which any Person may be entitled to assert . . . whether known or unknown . . . existing or hereinafter arising, based in whole or in part on any omission, transaction, duty, responsibility . . . or other occurrence existing or taking place on or prior to the later of the Plan Implementation date and the date on which actions are taken to implement the Consolidated CCAA Plan that are in any way related to, or arising our of or in connection with the Claims , the Arctic Glacier Parties' business and affairs whenever or however conducted . . ." CCAA Plan ¶ 9.1. The United States Recognition Order expressly grants the releases provided in ¶ 9.1. Both the Sanction Order and the United States Recognition Order expressly enjoin any action against a Releasee, providing that: "All Persons shall be permanently and forever barred, stopped, stayed and enjoined . . . in respect of any and all Releasees from: (I) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever . . . against the Releasees." Sanction Order ¶ 29; United States Recognition

[5] Although this Court need not address the continued of viability of claims in this Court against Corbin, who was dismissed from this action in 2009, the Court notes that Corbin, as a former employee who did seek indemnification from Arctic Glacier, also falls within the definition of a Releasee under the CCAA Plan.

Order ¶ 6.

Plaintiff does not dispute that his claims against Arctic Glacier and Knowlton in this Court arise out of Arctic Glacier's business affairs and thus are substantively within the types of claims that are released pursuant to ¶ 9.1, nor could he, given that his Schedule C Claim filed in the bankruptcy proceedings attaches his Complaint in this Court as documentary support for his claim. Thus McNulty's claims in this Court against Arctic Glacier are expressly released (a fact that McNulty does not appear to contest), as are his claims against Knowlton, a former employee of Arctic Glacier who could have filed a claim for indemnification in the Canadian proceedings, bringing him squarely within the express definition of a Releasee under ¶ 9.1. As the Monitor stated in his Twenty First Report, both Corbin and Knowlton were beneficiaries of the Release set forth in ¶ 9.1 of the Plan because both Corbin and Knowlton were former employees who did or could have filed indemnification claims against the debtor. Twenty-First Report of the Monitor ¶ 4.4. The Monitor explained that Corbin did file an indemnification claim and that Knowlton, although he did not file an indemnification claim, could have done so and in fact had been indemnified for his attorneys' fees. *Id*.

While it is unclear whether Knowlton was an officer or director, as to whom McNulty was required to file a DO&T Claim, it is irrelevant to this Court's determination that he is a "Releasee" under the plain language of § 9.1 of the CCAA Plan, which releases claims against "each and every present and former employee who filed or could have filed an Indemnity Claim . . . against the Arctic Glacier Parties." There is no evidence, or even a plausible suggestion, that Knowlton, Arctic Glacier's Director of Franchise Operations, could not have filed an indemnity claim against Arctic

Glacier.[6] The plain language of ¶ 9.1 releases claims against Arctic Glacier and against any former employee "who filed or could have filed an indemnity claim," and thus releases McNulty's claims against Arctic Glacier and Knowlton.

McNulty received copies of the CCAA Plan and notice of the Motions for Canadian and United States approval of the CCAA Plan and had ample opportunity to object to the provisions of the CCAA Plan. He did not do so and in fact he has fully embraced the processes set forth the CCAA Plan in pursuing his Unresolved Claim against Arctic Glacier (which he argues also is an Unresolved Claim against Knowlton, *see* discussion *infra*). Plaintiff's counsel, although actively prosecuting McNulty's Unresolved Claim in the Bankruptcy proceedings throughout the period of time that the Sanction and Recognition Orders were being vetted and approved, never filed an objection to either. In fact, Plaintiff's counsel reiterated multiple times at the December 3, 2015 hearing in this Court that as he interprets ¶ 9.1 of the CCAA Plan, his claims against Knowlton and Corbin are not barred by that Release Provision, and that based on that interpretation he did not object to the CCAA Plan. Thus, even crediting McNulty's suggestion that he never received notice of the Recognition Motion (a claim that is not supported by the bankruptcy court records and affidavits of service), there is no plausible suggestion that he would have filed an objection based on his admitted understanding of ¶ 9.1 of the Plan.

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[6] Plaintiff suggests that because Knowlton did not formally pursue an indemnification claim against Arctic Glacier, McNulty is free to proceed with his claims against him in this Court. This argument ignores the explicit Release language of ¶ 9.1 of the CCAA, which covers former employees who did "or could have filed" an indemnification claim. This plain language negates the suggestion that a former employee had to have successfully asserted such a claim. Plaintiff also unconvincingly argues, as his counsel reiterated at the hearing in this Court on December 3, 2015, that his claims against Knowlton are not released under the provisions of ¶ 9.1 because McNulty has an "Unresolved Claim" against Knowlton. *See infra* discussion at Section IIB2.

McNulty also suggests that the Delaware United States Bankruptcy Court did not have jurisdiction to approve a Plan provision that released claims against third party non-debtors, such as Mr. Knowlton, and therefore McNulty argues that the Release provision cannot operate to bar Plaintiff's claim against Mr. Knowlton in this Court. In *Pratt*, the Sixth Circuit held that it was error (although ultimately harmless) for the district court to fail to address as a threshold matter whether the Delaware bankruptcy court had jurisdiction to enter an order barring the plaintiffs' third party claims. 365 F.3d at 520-21. The Sixth Circuit noted that in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), the case on which defendants relied to support their argument for dismissal, the court examined whether the Florida bankruptcy had jurisdiction and concluded that the bankruptcy court did have jurisdiction to bar the third party claims because they were "related to" the bankruptcy proceedings. *Id*. at 520. Although the district court in *Pratt* had expressly declined to decide the issue of whether the bankruptcy court exceeded its jurisdiction by entering the injunction, the Sixth Circuit concluded that the error was harmless because plaintiffs had waived their right to object on that ground because they subsequently returned to the bankruptcy court for the very purpose of challenging that authority. *Id*.

In this case, the Delaware United States Bankruptcy Court did have jurisdiction to confirm the Plan's Release provision. The law is clear that a bankruptcy court has jurisdiction to release claims "between third parties which have an effect on the bankruptcy estate." *Celotex*, 514 U.S. at 307 n. 5. A potential claim for indemnification presents a sufficient potential to affect the bankruptcy estate to support the exercise of such jurisdiction. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In Re Dow Corning Corp.)*, 86 F.3d 482, 494 (6th Cir. 1996). McNulty implies (with no supporting evidence) that Knowlton would be precluded under the

Release provision from seeking indemnification and therefore any claim asserted against him in this case would have no effect on the bankruptcy estate. But the Sixth Circuit has "held that a claim is 'related to' the bankruptcy proceeding 'if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'" *In re Nat'l Century Fin. Enter., Inc., Inv. Litig.*, 497 F. App'x 491, 498-99 (6th Cir. 2012) (quoting *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996)). "[McNulty's] arguments about whether such claims for contribution and indemnification would be 'allowable' as claims against the bankruptcy estate are not relevant because the 'conceivable impact' of a claim on a bankruptcy estate, rather than its allowability as a claim on the estate's assets, is the touchstone of 'related to' jurisdiction." *In re Nat'l Century*, 497 F. App'x at 499 (citing *In re Dow Corning*). As the Monitor's response to McNulty's pursuit of his claims against Knowlton in this Court makes clear, Mr. Knowlton has already been indemnified for certain attorney's fees and further pursuit of McNulty's claims against Knowlton in this Court may well impact "the handling and administration of the bankrupt estate." McNulty's efforts to pursue a collateral attack in this Court against Knowlton has at least a "conceivable impact" on the administration of the bankruptcy estate and other stakeholders, including those who may be entitled to a distribution of excess funds after final administration of the bankruptcy estate. ECF No. 269, Ex. 6, April 13, 2015 Letter to D. Low from S. Jones. This Court concludes that the Delaware United States Bankruptcy Court had jurisdiction to confirm the Plan Release provision that enjoins McNulty's claim against Knowlton, which is "related to" the bankruptcy proceedings.

Under the express Release language of ¶ 9.1, both Arctic Glacier and Knowlton are "Releasees" and Plaintiff's claims against them in this Court have been released, discharged and

enjoined. Plaintiff cannot launch a collateral attack in this Court on the Release provision in ¶ 9.1 of the CCAA Plan, which was approved and adopted by Orders of the Canadian and United States Bankruptcy Courts. *See Pratt*, 365 F.3d at 519-20; *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480-81 (6th Cir. 1992) (noting that allowing parties to "launch collateral attacks on confirmed plans undermine[s] the necessary ability of the bankruptcy courts to settle all of the claims against the debtor"). If Plaintiff desires to mount an untimely objection to the CCAA Plan, any attempt to do so would be through the channels of the bankruptcy courts, not through a collateral attack in this Court. *Pratt*, 365 F.3d at 520.

2. Any "Unresolved Claim" that McNulty has filed in the Canadian bankruptcy proceedings must, under the clear terms of the CCAA Plan, the Claims Procedure Order and the Claims Officer Order, be "finally resolved" through the Claims Procedures approved in those Orders.

It is not disputed that Plaintiff has filed, and is actively pursuing, an "Unresolved Claim" against Arctic Glacier in the Canadian bankruptcy proceedings. Indeed, the Monitor has reserved $14.1 million for the McNulty Claim, which is the full amount of damages claimed by McNulty in his Schedule C Claim. ECF No. 264, Ex. 1, Proof of Claim. McNulty's Unresolved Claim against Arctic Glacier has been referred to a Canadian Claims Officer for determination and that Claims Officer has recently permitted McNulty to expand his Unresolved Claim to include an antitrust claim.[7] Plaintiff takes the position, as explained in his briefing in this Court and at the December

[7] This Court, on the other hand, will deny McNulty's motion to amend his Complaint in this action to add an antitrust claim. Unlike the Claims Officer in the Canadian bankruptcy proceeding, this Court must analyze McNulty's proposed amendment for futility, which entails an analysis of the law of the case doctrine as applied to this Court's 2009 Order. The Court finds no plausible suggestion, even considering McNulty's claimed "new evidence," of a claim of antitrust injury that would cause this Court to reach a different conclusion with regard to McNulty's proposed reasserted antitrust claim than it reached in 2009. *See infra* discussion at Section III.

3, 2015 hearing in this Court, that his claim against Knowlton is part and parcel of his claim against Arctic Glacier and is also therefore an "Unresolved Claim" as that term is defined in the CCAA Plan. *See* ECF No. 264, Pl.'s Reply to Motion to Sever 2-4.[8] As such, McNulty argues, his claims against Knowlton are not released under ¶ 9.1 of the CCAA Plan, which excepts from its provisions "Releasees in respect of Unresolved Claims" and does not purport to discharge a Releasee from "any obligation created by or existing under the Consolidated CCAA Plan or any related document." CCAA Plan ¶ 9.1.

Defendants dispute that the Schedule C Claim filed by McNulty against Arctic Glacier also served to perfect an "Unresolved Claim" against Knowlton. *See* ECF No. 270, Defs.' Reply in Support of Motion to Dismiss 2-4. But the Court need not resolve this dispute because, accepting without deciding Plaintiff's assertion that he does indeed have an "Unresolved Claim" against Knowlton by virtue of his Unresolved Claim against Arctic Glacier, then that claim is currently being adjudicated in the Canadian proceeding by a Canadian Claims Officer who was appointed pursuant to Orders that have been adopted by the Delaware United States Bankruptcy Court and as to which the United States Bankruptcy Court retains jurisdiction as to all matters relating to "interpretation and implementation." *See* CCAA Plan ¶ 7.3; ECF No. 270, Ex. C, Claims Procedure

[8] While Plaintiff objects to the Defendants' relying to any extent on documents from the bankruptcy proceedings, he apparently feels free to do so himself. Plaintiff relies solely on the Monitor's 15th and 18th Reports to support his contention that his claims against Knowlton are "Unresolved Claims" under the CCAA Plan. In those Reports, the Monitor summarizes McNulty's claims in this action and reports that McNulty pursues claims against Knowlton (and Corbin) in this proceeding in this Court. From these summary statements made in the Monitor's Report, McNulty concludes that the Monitor has "created an obligation under the plan," and acknowledged McNulty's Unresolved Claim against Knowlton (and Corbin) as well as against Arctic Glacier. The Court need not resolve the issue of the scope of McNulty's Unresolved Claim for purposes of its ruling on Defendants' Motion to Dismiss.

Recognition Order; ECF No. 270, Ex. D, Claims Officer Recognition Order. If McNulty is dissatisfied with the final resolution of his "Unresolved Claim," whatever its scope, his avenue of appeal is through the bankruptcy courts, not through a collateral attack in this Court.

Even if, as McNulty argues, he has an "Unresolved Claim" against Knowlton, this does not alter Knowlton's status as a "Releasee" under ¶ 9.1. His claims against Knowlton (and Arctic Glacier) in this Court have been finally released, discharged and enjoined pursuant to ¶ 9.1 of the CCAA Plan and the injunctions set forth in the Sanction and United States Recognition Orders. The "exception" for Releasees with "Unresolved Claims" set forth in ¶ 9.1 simply permits McNulty to proceed with an "Unresolved Claim" against Knowlton (if he has one) *in the Canadian bankruptcy proceedings*; and that Unresolved Claim, just like the Unresolved Claim against Arctic Glacier, will be "finally determined" through the Claims Procedure process that has been approved by Orders of the Canadian and Delaware United States Bankruptcy Courts. An attack in this Court on that process, or on the outcome of that process, is an impermissible collateral attack on the Orders of the Canadian and Delaware United States Bankruptcy Courts. *See Pratt*, 365 F.3d at 519-20; *Sanders*, 973 F.2d at 480-81 (noting that allowing parties to "launch collateral attacks on confirmed plans undermine[s] the necessary ability of the bankruptcy courts to settle all of the claims against the debtor").

McNulty fails to acknowledge that the CCAA Plan, and the Claims Procedure Order and Claims Officer Order provide the exclusive process for resolution of "Unresolved Claims." *See Pratt*, 356 F.3d at 519-20 (holding that collateral attack on plan confirmation order was barred by both collateral estoppel and res judicata). If McNulty ultimately wishes to dispute the final resolution of his Unresolved Claim, his recourse, as noted *supra*, is to the Canadian Bankruptcy

Court, the U.S. Bankruptcy Court in Delaware, the United States District Court for the District of Delaware, and the United States Court of Appeals for the Third Circuit. *Pratt*, 365 F.3d at 518 (citing *Celotex*, 514 U.S. at 313). He has no recourse in this Court to mount or continue a collateral attack.

The Court concludes that ¶ 9.1 of the CCAA Plan clearly and unambiguously bars McNulty's claim in this Court against Arctic Glacier and Knowlton and that McNulty's "Unresolved Claim," which McNulty is vigorously pursuing in the Canadian Bankruptcy proceedings, is subject to final resolution under the Claims Procedure and Claims Officer Orders approved by the Delaware United States Bankruptcy Court. Those procedures vest exclusive jurisdiction over resolution of McNulty's Unresolved Claim in the Canadian and Delaware United States Bankruptcy Courts. The Court therefore GRANTS the motion to dismiss the claims against Arctic Glacier and Knowlton.

The Court also DENIES AS MOOT the motion to sever the trial of "the bankrupt Defendants," defined by McNulty as Arctic Glacier and Joseph Riley (who was dismissed from this action on April 22, 2015), and to proceed to trial against Home City, Keith Corbin and Charles Knowlton. ECF No. 249, Motion to Sever. The motion to sever is moot based upon the dismissal of Arctic Glacier and Knowlton and the acknowledged earlier dismissal from the case of Corbin, who in any event, like Knowlton, would be a Releasee under ¶ 9.1 of the CCAA. Home City remains the sole Defendant in the case, obviating the need for the Court to consider "separate trials."

III. PLAINTIFF'S MOTION FOR LEAVE TO AMEND

Plaintiff moves to amend the Complaint in this action, for a second time, pursuant to Federal Rule of Civil Procedure 15. (ECF No. 250, Sealed Mot. for Leave to Amend, Ex. A, Proposed Second Amended Complaint ("SAC")). Rule 15 provides that leave to amend "shall be freely given

when justice so requires." Fed. R. Civ. P. 15(a)(2). "When considering whether to grant leave to amend a complaint, the court considers "'[u]ndue delay in filing, lack of notice to the opposing party, bad faith by the moving party, . . . and futility . . . .'" *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998) (quoting *Brooks v. Celeste*, 39 F.3d 125, 130 (6th Cir. 1994)). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

"Amending would be futile if a proposed amendment would not survive a motion to dismiss." *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014). Undue delay considers whether plaintiff was in possession of the facts that underlie the proposed amendment but failed to act diligently or appears to be acting purposefully to put the defendant at a disadvantage in the discovery process. Prejudice generally will be found where the amendment will require the defendant, too late in the game, to prepare a new defense strategy and invest additional resources in defending against the claim.

Defendants respond that the law of the case doctrine precludes Plaintiff's proposed amendment, which seeks to reassert claims that were previously dismissed by this Court in its 2009 Orders. Indeed, Plaintiff concedes the validity of this characterization of his proposed amendments, stating that his "proposed complaint seeks to reinstate dismissed claims, not assert new or unexpected claims." ECF No. 268, Sealed Reply 7. The Court agrees that Plaintiff's proposed

amendments, which seek to reassert the identical antitrust and RICO conspiracy claims that this Court expressly dismissed in its 2009 Orders, must be analyzed under the law of the case doctrine. *See White v. Smiths Detection, Inc.*, No. 10-4078, 2013 WL 1845072, at *18-20 (D.N.J. April 30, 2013) (denying plaintiff's motion to file a second amended complaint to reassert claims previously dismissed, finding that plaintiff's new evidence did not justify an exception to the law of the case doctrine). If Plaintiff's proposed SAC could not survive a motion to dismiss based on law of the case, amendment would be futile and leave to amend denied. *See Bennie v. Munn*, No. 11-3089, 2012 WL 1574453, at *1-2 (D. Neb. May 3, 2012) (denying motion to amend as futile where plaintiff's attempt to cure defects in his previously dismissed claims by amendment would not survive a motion to dismiss under the law of the case).

"Under the doctrine of the law of the case, a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation." *McCready v. Mich. State Bar Standing Comm. On Character and Fitness*, 926 F. Supp. 618, 620 (W.D. Mich. 1995) (quoting *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1995)). "[T]he law of the case doctrine is discretionary 'when applied to a coordinate court or the same court's own decisions.'" *Bench Billboard Co. v. City of Covington, Ky.*, 547 F. App'x 695, 704 (6th Cir. 2013) (quoting *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005)). The doctrine precludes reconsideration of a previously decided issue unless one of three "exceptional circumstances" exists: (1) substantially different evidence is available; (2) a supervening contrary view of the law is announced; or (3) the earlier decision is clearly erroneous and would work a manifest injustice. *Id*. at 705-06. "[T]he exception based on the availability of new evidence 'applies only if the record actually contains new evidence and 'if the new evidence differs materially from the evidence of record when the issue was

first decided and if it provides less support for that decision.'" *Id*. at 706 (quoting *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich*. 418 F App's 430, 435 n. 4 (6th Cir. 2011) (quoting *Hamilton v. Leavy*, 322 F.3d 776, 778 (3d Cir. 2003)). "[A] court's power to reach a result inconsistent with a prior decision reached in the same case is to be exercised very sparingly, and only under extraordinary circumstances." *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 677 (6th Cir. 2002) (citation and internal quotation marks omitted) (alteration added).

A. Plaintiff Claims That "New Evidence" Supports His Request for Leave to Amend.

McNulty argues that his "motion for leave to amend should be granted because it is based on new evidence that he . . . obtained during discovery, including information from tape recordings he received in March 2012, shortly after Arctic Glacier's bankruptcy filing." (ECF No. 250, Sealed Mot. 8, n. 6-14.) Acknowledging that this Court previously dismissed his antitrust claim for failure to allege antitrust injury to the market of packaged ice sales representatives, Plaintiff claims that the proposed SAC "cures this deficiency by alleging a group boycott of a particular segment of employees, i.e. salespersons who would not participate in the market allocation conspiracy, causing a salesperson who refused to participate to be unable to obtain employment as packaged ice salespersons, causing injury in the market for packaged ice salespersons." Mot. 12-13. He claims that these allegations are "adequate to state a group boycott claim." *Id*. at 13. While such a formulaic recitation of those elements that the Court found lacking in Plaintiff's Complaint likely would not have saved McNulty's claim from dismissal in 2009, the issue in 2016 under a law of the case analysis is whether Plaintiff has unearthed new evidence that is so materially different from what was available at the time Plaintiff's claims were dismissed that the Court is presented with "an extraordinary circumstance" requiring the Court to revisit its 2009 dismissal. *White*, 2013 WL

1845072, at * 19 ("If evidence is allegedly new, the court determines whether it constitutes an extraordinary circumstance warranting reconsideration of a previously-decided issue by comparing the new evidence to evidence pleaded previously in support of that same issue.") (citing *Hamilton v. Leavy*, 322 F.3d 776, 787 (3d Cir. 2003)).

Plaintiff argues that his "new" evidence plausibly suggests an agreement among the Defendants to boycott all packaged ice sales persons who refused to participate in their market allocation scheme, reducing competition in the market for packaged ice sales persons, *see* Mot. 5-6 and proposed SAC ¶ 49, and plausibly now suggests a RICO conspiracy, *see* Mot. 19. Plaintiff claims that as a result of this "group boycott" of his services, he was unable to find employment for a number of months, was forced to take lower-paying jobs, lost his home to foreclosure and faces decreased expected career earnings. Mot. 6.

Specifically, Plaintiff relies on the following "new evidence" in support of his request for leave to amend his complaint:

(1) A telephone conversation between Mr. A[9] of Home City and Mr. B of Arctic Glacier, recorded by Mr. A in 2007 when he was cooperating with the government in its investigation of the Defendants' alleged participation in a market allocation conspiracy. (Sealed Mot. Ex. E.) Plaintiff asserts that he received evidence of this call in 2012 when he obtained the DOJ recordings. He asserts that this phone conversation supports the new allegations contained in paragraph 49 of his proposed second amended complaint, which provides:

[9] The parties' filings in connection with Plaintiff's motion to amend have been filed under seal. The Court has confirmed with the Government that maintaining anonymity of the individuals involved in these recorded conversations satisfies the Government's concerns with confidentiality. The Court will disclose the identities of the individuals in a separate sealed filing.

> In September, 2007, Home City was looking to fill an opening for vice-president of sales because the previous VP of Sales, Mr. C, had passed away. Mr. A, of Home City, asked Mr. B to recommend someone for the position. Over the course of the conversation, Mr. A and Mr. B agreed that the candidate would need to be willing to participate in the market allocation conspiracy, and would need to be willing to "keep [] the peace . . . with other ice companies," just as Mr. C had previously done for Home City and Mr. B had done for Arctic Glacier. Like Arctic Glacier and other conspirators, Home City would not hire anyone who had not demonstrated a willingness to engage in the unlawful market allocation scheme. Mr. B noted that he, Mr. C and Reddy Ice had "worked close[ly]" on their market allocation conspiracy because "we don't need to make the retailers wealthy." Although Home City still had Mr. McNulty's application on file, and despite Mr. B's previous statement to Mr. McNulty that he would become the VP of Sales at Arctic Glacier, and would have been an ideal candidate for Home City, Home City did not contact Mr. McNulty about the position.

Sealed Mot. Ex. A, Proposed Second Amended Complaint ("SAC") ¶ 49.

(2) Three audio recordings, also allegedly obtained in 2012 from the DOJ recordings, none of which is transcribed or provided to the Court in any form but are "available upon request." McNulty was a participant in each of these recorded conversations and references to these same conversations are found in McNulty's original Amended Complaint in this Court. *See, e.g.* ¶¶ 46-48. Notwithstanding the fact that McNulty obviously has known of these conversations since they occurred 2006, he asserts that these recordings support the new allegations in paragraphs 51-52, 54 and 56 of his Proposed SAC, which describe conversations with Mr. D of Tropic Ice that Mr. McNulty tape recorded in 2006 when he was wearing a wire and assisting with the FBI investigation into an alleged market allocation agreement among packaged ice distributors. The SAC alleges that in these conversations, Mr. D and McNulty discussed the possibility of McNulty working for Tropic Ice and that Mr. D found McNulty's resume "impressive" and that Mr. D was surprised that Arctic Glacier let McNulty go. Mr. D allegedly said that Reddy and Home City "don't compete" and that

there was a collusive relationship among Reddy, Home City and Arctic Glacier. Allegedly, Mr. D told Mr. McNulty that he was being "blackballed" from the packaged ice industry. Mr. D allegedly admitted that Tropic Ice had been conspiring with Arctic Glacier to allocate markets and that he, Mr. D, had entered into an agreement with Mr. E of Arctic Glacier not to compete on price. Mr. McNulty alleges that at the conclusion of the conversation, Mr. D said he would call McNulty about a job but that McNulty waited 6 weeks and Mr. D did not call. McNulty then wired up again and recorded another conversation in which Mr. D told McNulty that the "conspirators" were concerned about how their actions would appear to the FBI, which they knew was investigating the market allocation scheme.

3) A chain of emails from early July, 2005 between Mr. F of Arctic Glacier to Mr. G of Arctic Glacier. (Sealed Mot. Ex. G.) This email chain suggests that Chuck Knowlton of Arctic Glacier wanted to pay McNulty an additional $10,000 in severance pay. Keith McMahon of Arctic Glacier rejected the idea because "McNulty would have signed a waiver when he accepted" his severance package and to "subsequently change our end of the deal would compromise our position." Mr. F informed Chuck Knowlton that Arctic would not participate in the additional payment and Chuck indicated that he would "handle it independent of Arctic." McNulty alleges that he received this email chain in the course of discovery (over three years ago) and that it supports the allegations of ¶ 42 of the SAC that Arctic Glacier was worried that this $10,000 payment would appear to be a bribe to dissuade McNulty from cooperating with authorities. The Court notes that Plaintiff produced no evidence in support of his motion to amend indicating that any such additional payment ever occurred. McNulty did sign on to the severance agreement payment.

4) An August 1, 2005 handwritten note that appears to be documenting a conversation between an Arctic Glacier employee (Chuck Knowlton) and Mr. C of Home City. (Sealed Mot. Ex. H.) The note suggests that Chuck Knowlton told Mr. C that the FBI investigation into price fixing in the packaged ice industry was "spurred by Marty McNulty," and that Mr. McNulty was "irate" about "the way he was treated during Chuck Knowlton's sale of the business." The note states that Chuck told Mr. C that McNulty screamed at Chuck that he had "ruined the McNulty family." It is unclear when McNulty received this evidence but it was sometime during the course of discovery (over three years ago). McNulty submits that this evidence supports the allegations of ¶ 47 of the SAC that Chuck Knowlton told Home City that the antitrust investigation was "spurred by" Mr. McNulty and that Chuck Knowlton "told Home City not to hire Mr. McNulty."

5) A September 30, 2005 retirement and severance agreement between Arctic Glacier and Mr. B and a March 7, 2005 Employment Verification Form for Mr. E application for employment with Arctic Glacier, whom Arctic Glacier subsequently hired. (Sealed Mot. Exs. I and J.) McNulty asserts that this "new evidence" supports the allegations of ¶ 56 of the SAC that when Mr. B retired, Arctic Glacier promoted Mr. H to his position and hired Mr. E, neither of whom was as qualified as McNulty. McNulty asks the Court to infer from this evidence that Mr. H and Mr. E were hired or promoted because of their willingness to participate in the market allocation conspiracy. SAC ¶ 57. Mr. H was subsequently indicted for conspiring to allocate markets in Southeastern Michigan and pled guilty. Mr. E was never indicted.

6) Home City's Supplemental Responses to Plaintiff's Interrogatories, which explain that Mr. A and Mr. I of Home City recalled that Mr. C told them that Chuck Knowlton (Arctic Glacier) discussed with Mr. C (Home City) a possible payment to McNulty. McNulty asserts that

this evidence supports the allegation of ¶ 42 of the SAC that Chuck Knowlton discussed the $10,000 payment to Mr. McNulty with Mr. C and "they agreed on a plan of action." McNulty received this supplemental response on September 13, 2011.

7) Mr. D's Response to Plaintiff's Interrogatories, in which Mr. D explains that he met with McNulty in January, 2006 to discuss McNulty's possible employment at Party Time Ice and that by the time Mr. D got back to McNulty in April, 2006, McNulty replied that he had already obtained another job. Mr. D also answered that he spoke with Mr. E of Arctic Glacier by phone and told Mr. E that McNulty was "a loose cannon." McNulty asserts that this evidence supports the allegation of ¶ 53 of the SAC that Mr. E cautioned Mr. D against hiring Mr. McNulty because he was "a loose cannon." From the fact that Mr. D did not immediately follow up with McNulty, McNulty "reasonably surmised that Tropic Ice must have also agreed to boycott Mr. McNulty." McNulty received this interrogatory response on September 30, 2009.

B. Plaintiff's "New Evidence" is Not New.

Plaintiff received the four "new" DOJ recordings in March, 2012: he has waited over three years to seek leave to amend based on those recordings. Three of the recordings were recorded by McNulty himself. As to those three recordings, the Court is in the dark as to whether they plausibly suggest any of the new allegations that Plaintiff claims they do because Plaintiff has provided neither the recordings nor a transcript of the recordings for the Court to review but it is clear that they also have been in Plaintiff's possession for over three years. The discovery responses have been in Plaintiff's possession for at least four years. At the hearing on this motion, Plaintiff expressly confirmed in response to direct questioning by the Court that his "new evidence" relates to matters that were discovered by him about three years ago or more. Thus, it is undisputed that none of

Plaintiff's "new evidence" is new.

Plaintiff claims that he is not guilty of undue delay in this case because this matter has been stayed in this Court against the bankrupt defendants, Arctic Glacier and Reddy Ice. But, in the meantime, in the cases against the two bankrupt Defendants, he has been actively proceeding in the bankruptcy courts in Texas (Reddy Ice) and Manitoba/Delaware (Arctic Glacier). Plaintiff has been vigorously pursuing his claims against both bankrupt Defendants; actively litigating in the Canadian bankruptcy proceedings against Arctic Glacier, and resolving his claims against Reddy Ice in the now concluded Texas bankruptcy proceedings.

This case has not been stayed as to Home City, and Plaintiff has never proceeded on his claims against them for many years. Canadian Claims Officer Ground did not have occasion to address prejudice or delay as to Home City, because Home City has never been part of the proceedings in Winnipeg. Home City has been waiting for four years for Plaintiff to take some action in this Court on the sole claim against them that survived this Court's 2009 dismissal order, i.e. a RICO claim under § 1962(c) – Plaintiff's antitrust and RICO conspiracy claims that he now seeks to resurrect against Home City were dismissed in 2009.

Home City, finally, in April, 2015, asked the Court for permission to destroy documents that had been languishing because Plaintiff had taken no action in this matter in over four years. *See* ECF No. 244, Motion for Protective Order and Authority to Destroy Paper Documents. Only in response to this Home City filing did McNulty re-engage in this action by filing the motions that are presently before the Court. In waiting years to resurrect an antitrust claim and a RICO conspiracy claim that were expressly rejected by this Court six years ago, Plaintiff has created significant prejudice for Home City with no excuse for its delay. On the other hand, Plaintiff, who has been

actively litigating his claims against Arctic Glacier over many years, has been granted leave to amend his claim in the Canadian Bankruptcy proceedings to assert the antitrust claim.

Significantly, Plaintiff takes the position that his Unresolved Claim in the Arctic Glacier Bankruptcy Proceeding is "the same" claim that is pending before this Court: he seeks statutory and treble damages on his Unresolved Claim, for which the Canadian Monitor has reserved $14.1 million. Thus, Plaintiff has actively litigated his Arctic Glacier claims in Canada and Delaware, and resolved his claims against Reddy Ice in Dallas while taking no action in this Court on claims dismissed by this Court many years ago.[10]

C. Plaintiff's "New Evidence" Does Not Present an "Extraordinary Circumstance" That Would Override Application of the Law of the Case Doctrine and Therefore the Motion for Leave to Amend is Denied.

As discussed *supra*, Plaintiff's claims against Arctic Glacier and Knowlton (and any attempted resurrected claim against Corbin) are barred, released and enjoined by Orders of the Canadian and United States Bankruptcy Courts. Accordingly, leave to amend as to them is patently futile. As to Home City, the only remaining Defendant in this action, Plaintiff's "new evidence" suggests nothing different than the evidence plausibly suggested in 2009, that McNulty allegedly was blackballed by the Defendants and injured as a result of his inability to gain employment. Nothing in Plaintiff's "new evidence" would convince this Court to reconsider its 2009 rulings that Plaintiff failed to allege antitrust injury and failed to allege a RICO conspiracy. The law of the case doctrine precludes relitigation of Plaintiff's antitrust and RICO conspiracy claims absent an

[10] As noted *supra*, this Court is not bound by Claims Officer Ground's decision to permit McNulty to amend his Unresolved Claim in the Canadian bankruptcy proceedings. Claims Officer Ground had no occasion to consider the futility of that amendment in this Court based on the law of the case doctrine.

"extraordinary circumstance" that would permit the Court to reconsider its prior rulings. While "new evidence" may, in certain "extraordinary circumstances," require a court to revisit a previous ruling, it fails to do so where, as here, it does not support the proposed reasserted claim.

McNulty claims that he has cured the defects noted by this Court in its 2009 dismissal of his antitrust claim because he "has now alleged a boycott and injury to packaged ice salespersons who were unwilling to participate in the market allocation conspiracy." ECF No. 268, Sealed Reply 5. While McNulty's proposed SAC recites this allegation, the law of the case doctrine requires the Court to examine the "new evidence" behind those allegations to determine whether that "new evidence" supports the proposed allegations and creates an "extraordinary circumstance" requiring the Court to reconsider its 2009 ruling. Nothing in McNulty's "new evidence" supports an inference of an agreement among the Defendants to reduce competition in the market for sales persons in the packaged ice industry. Indeed, as the evidence suggested in 2009, the new evidence suggests at most a boycott of McNulty for his refusal to participate in the market allocation conspiracy and injury to him personally. Thus, like the First Amended Complaint before the Court in 2009, the proposed SAC does not allege antitrust injury as a result of an agreement to restrain trade in the employment market for packaged ice salespersons.

In his First Amended Complaint that was the subject of this Court's prior ruling that McNulty failed to allege antitrust injury, Plaintiff made the same conclusory relevant market allegations he offers now: that "the market for the purchasing of packaged ice sales services[]" was a "distinct and relevant market" that was affected by the boycott conspiracy because it "enabled the Defendants to continue their unlawful price-fixing [sic] scheme," and "deprived McNulty of employment in the only industry in which he had professional experience." (Am. Compl. ¶¶ 1, 52,

53, 55.) Fatal to his antitrust claim, however, McNulty failed to allege an anticompetitive effect on the market for packaged ice sales representatives. His "new evidence" does not support such an allegation now.

The "new evidence" that McNulty asserts bears on this allegation, *i.e.* the telephone call between Mr. A and Mr. B regarding the hiring of a replacement for Mr. C, first is not new and second does not plausibly suggest an agreement to restrain trade that has had an anticompetitive effect on the market for packaged ice salesman. The conversation was recorded two years after Arctic Glacier terminated McNulty. Plaintiff alleges that in this conversation, Mr. A and Mr. B agreed that Mr. C's replacement would have to be willing to participate in the market allocation conspiracy, thus supporting his allegation that the Defendants conspired to reduce competition in the market for packaged ice salespeople. Plaintiff suggests that this inference is further supported by the fact that Mr. B did not recommend McNulty for the position and Home City ultimately did not hire McNulty. SAC ¶ 49.

It is perhaps unsurprising that Arctic Glacier's Mr. B did not think to recommend McNulty, a salesman whom Mr. B had known for only approximately one month before McNulty was terminated in January, 2005, for a job two years later as Home City's Vice President of Sales. *McNulty*, 2009 WL 1508381, at *3. The 2007 telephone conversation between Mr. A and Mr. B does not plausibly suggest an agreement among the Defendants to reduce competition in the market for packaged ice salespersons. Plaintiff takes snippets of the recorded conversation out of context to cobble together the implausible and unsupported inference that there was an agreement that targeted the entire packaged ice sales person market. It was Mr. A, acting as a cooperating witness for the government, not Mr. B, who made the comment about "keeping the peace out there." To the

extent that Mr. B did adopt that sentiment by stating that he works closely with Reddy and Home City so as not to "make the retailers wealthy," nothing in this conversation suggests that this comment relates to an agreement to hire only salespeople willing to participate in a market allocation scheme as opposed to an agreement among competitors to stay out of each other's territories (the agreement that was the object of the government's investigation). McNulty's allegation that "Mr. A and Mr. B agreed that the candidate would need to be willing to participate in the market allocation conspiracy" is surely not stated in this conversation and is not even a plausible inference from this evidence. Nothing in this conversation suggests a conspiracy whose primary object was to restrain trade in the labor market for packaged ice salespersons.

In its 2009 Opinion, this Court noted that Plaintiff's claims were not governed by *Radovich v. National Football League*, 352 U.S. 445 (1982) and similar cases because Plaintiff had not "alleged an anticompetitive conspiracy directed at a respective employment market . . . ." 2009 WL 1508381, at *19. Nothing in Plaintiff's "new evidence" changes that conclusion. To cite Plaintiff's own "new evidence," the object of the conspiracy in this case was to "keep the peace with other ice companies," and "not make the retailers wealthy." There is no "new evidence" to suggest that the object of the conspiracy was directed to the packaged ice salesperson labor market. Absent an extraordinarily strong basis for finding in Plaintiff's new evidence the suggestion of an agreement whose primary purpose was to reduce competition in the market for packaged ice sales representatives, McNulty's antitrust claim stands exactly where it stood in 2009 – without a plausible allegation of antitrust injury in the labor market for packaged ice salespersons.[11]

[11] Plaintiff continues to cite the Ninth Circuit's decision *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 742-43 (9th Cir. 1984) as support for his antitrust claim. As the Court noted in its 2009 Order dismissing McNulty's antitrust claim, *Ostrofe* was expressly limited to its facts by *Exhibitors'*

The essence of McNulty's proposed antitrust claim is that Defendants participated in a group boycott of his services to prevent him from obtaining employment in the packaged ice industry. He alleges that Defendants spoke of "blackballing" him from the industry and agreeing among themselves to refuse to hire him. (Am. Compl. ¶¶ 31, 32, 43-48, 49.) As this Court previously held in dismissing Plaintiff's antitrust claim in 2009, injury to a single individual is not proof of injury to competition. In determining whether to disregard the law of the case and to revisit its 2009 dismissals, this Court must look behind McNulty's new "allegations" to his "new evidence." While McNulty invokes additional formulaic language in his SAC to allege the existence of a conspiracy to reduce competition in the market for the services of packaged ice sales persons, and alleges "facts" that he suggests support his theory, his "new evidence" does not support the "facts" he alleges and does not plausibly suggest the existence of a conspiracy whose primary purpose was to reduce competition in the market for packaged ice salesmen. The Court finds in Plaintiff's "new evidence" no extraordinary circumstance that would require it to revisit its 2009 dismissal of

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Service, Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 579-80 (9th Cir. 1986) and *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372 (9th Cir. 1996). The Sixth Circuit has rejected the rationale of *Ostrofe* by expressly declining to follow *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986), a case that adopted the reasoning of the Ninth Circuit in *Ostrofe*. *See Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 n. 4 (6th Cir. 1989), *abrogated on other grounds by Humphrey v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1997) (declining to follow *Donahue's* guidance and noting that: "[N]o useful policy is served by granting standing to a terminated employee for a product market violation that is known to others") (alteration in original). Here, not only do more direct victims of the market allocation conspiracy exist, *i.e.* retailers and consumers of packaged ice, but those victims have vigorously pursued and vindicated their rights in a massive multi-district litigation involving both direct and indirect purchasers. The reality is that "[McNulty's] injury did not result from a lack of competition in the labor market," and he is not "the appropriate antitrust enforcer" in this case. *In re Industrial Gas Antit. Litig.*, 681 F.2d 514, 517, 520 (7th Cir. 1982) (holding that whistleblower who was terminated for refusing to participate in a conspiracy to fix prices and allocate markets, and subsequently was blacklisted by the industry, could demonstrate neither antitrust injury nor antitrust standing).

Plaintiff's antitrust claim. Accordingly, Plaintiff's motion to amend to reassert his antitrust claim is DENIED.

The RICO conspiracy claim was not revived in this Court's subsequent decision reinstating Plaintiff's RICO claim under § 1962(c) and Plaintiff never sought reconsideration of the Court's ruling on the RICO conspiracy claim. 2009 WL 2168231, at *5. This Court concluded in 2009 that Plaintiff's RICO conspiracy claim failed against all Defendants because there was no allegation that Home City, Reddy Ice, or Riley ever agreed to any acts of witness tampering against Plaintiff and thus Plaintiff had failed to allege "that any of the other Defendants agreed with Arctic Glacier to commit two predicate acts." 2009 WL 1508381, at *16.

In support of his request to reassert his RICO conspiracy claim, Plaintiff relies on the "new evidence" in Exhibits G, J and K that he claims supports ¶¶ 41-42, 49 and 56 of the proposed SAC. Exhibit G is an email chain between Arctic Glacier employees regarding Knowlton's suggestion that McNulty be paid an additional $10,000. Arctic Glacier responded that Knowlton would have to handle this on his own and that Arctic Glacier wanted no part of it unless they received legal advice. McNulty characterizes this Exhibit as evidence of a bribe from Knowlton to dissuade McNulty from cooperating. This adds nothing to the allegations that the Court found insufficient in 2009, as it fails to plausibly suggest the involvement of Home City, Reddy Ice or Riley. 2009 WL 1508381, at *16. Exhibit J is Mr. E's employment application and has no bearing on the issue of witness tampering. Exhibit K are Home City's supplemental answers to interrogatories in which Home City responds that Mr. A and Mr. I recall that Mr. C told them that Chuck Knowlton discussed with Mr. C a possible payment to McNulty. Mr. A and Mr. I did not recall when this conversation occurred or whether McNulty had made a demand for such a payment. McNulty asserts that this "new

evidence" supports the allegation that Mr. Knowlton discussed with Mr. C a $10,000 payment to McNulty to dissuade him from cooperating and that Knowlton and Mr. C "agreed on a plan of action." Mr. McNulty concludes from this that "Home City, Arctic Glacier and Mr. Knowlton conspired to stop Mr. McNulty's cooperation with government investigators." SAC ¶ 42. As noted before, this additional payment never occurred. Further, this "new evidence" says nothing about the purported purpose of the $10,000 payment and certainly nothing supporting the allegation that a "plan of action" was agreed upon or suggesting what such a "plan of action" entailed. None of this "new evidence" supports the allegation that the Court found missing in 2009, when it concluded that Plaintiff failed to allege that Home City, Reddy Ice and Mr. Riley agreed to an act of witness tampering. This "new evidence," which is not "new," creates no "extraordinary circumstance" requiring this Court to reconsider its 2009 dismissal of Plaintiff's RICO conspiracy claim.

Additionally, McNulty offers no explanation for his failure to act on this "new evidence" when he discovered it over three years ago. If this "new evidence" was the "eureka" breakthrough McNulty ascribes to it now, he should have implored the Court then and there to grant him leave to amend to reassert these claims and expand the scope of discovery. Not only did he not do so, but he elected not to proceed with discovery against Home City at all. Home City has prepared to defend itself against the single RICO claim that survived this Court's 2009 partial dismissal of McNulty's claims. It is difficult to predict what Home City would have done differently over these past three years that McNulty has been sitting on his "new evidence" had it known that it might also have had to defend an antitrust claim and a RICO conspiracy claim. McNulty argues that there is no prejudice due to his delay because the parties were aware of these claims, which were asserted in his original amended complaint and dismissed. But that is precisely the point! The claims were

dismissed in 2009 and the parties had no reason to believe that they should stand ready to defend against them. Although prejudice need not be found where Plaintiff's amendments would be futile, it is certain that at the very least memories have faded and Home City would suffer significant prejudice if they were required to gear up such defenses now. Moreover, as noted *supra*, McNulty does have a venue to assert his antitrust claim and he is actively litigating that claim in the Canadian bankruptcy proceedings.

The law of the case doctrine requires McNulty to do more than simply recite in 2016 what the Court found lacking in 2009. He has failed to convince the Court that he has "new evidence" that is so materially different from what was available in 2009 that it presents an "extraordinary circumstance" of such magnitude that the Court must reconsider its 2009 ruling. Accordingly, his motion for leave to amend to reassert the very same claims that this Court dismissed in 2009 is DENIED.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants Arctic Glacier and Knowlton's Motion to Dismiss (ECF No. 256), DENIES AS MOOT Plaintiff's Motion to Sever Bankrupt Defendants (ECF No. 249) and DENIES Plaintiff's (Sealed) Motion for Leave to Amend (ECF No. 250).[12] Only Plaintiff's claim against Home City for a RICO violation continues in this Court.

IT IS SO ORDERED.

s/Paul D. Borman
Paul D. Borman
United States District Judge

Dated: February 8, 2016

[12] The Court also DENIES AS MOOT Plaintiff's Motion to Exclude Testimony or Argument of Shauna Jones. (ECF No. 276.) Ms. Jones attended the December 3, 2015 hearing on behalf of the Monitor but offered no evidence or argument.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on February 8, 2016.

s/Deborah Tofil
Case Manager

Appendix “F”

9MARTIN G. McNULTY, **Claimant,** **v.** **ARCTIC GLACIER INCOME FUND; ARCTIC GLACIER, INC.; ARCTIC GLACIER INTERNATIONAL, INC.,** **Debtors.**	**Queen's Bench, Winnipeg Centre** **Court File No. CI 12-01-76323** **Before Claims Officer Jack Ground**

ORDER

IT IS SO ORDERED THAT:

1. The Timetable for the remainder of Phase I of the proceeding is set forth in Revised Schedule B attached hereto.

2. No Spoliation Motion shall proceed during Phase I of the proceeding.

3. In the interest of an expedient resolution, the timetable for the remainder of Phase I may only be varied by the Parties with approval of Justice Ground for good cause shown. Justice Ground may also make changes to the Timetable *sua sponte*.

May 9, 2016

J.D. Ground, Claims Officer

Revised Schedule "B" – Timetable for Remainder of Phase I

Date	Event	Party
Feb. 19, 2016	Order regarding production of documents.	Justice Ground
March 9, 2016	McNulty receives over 200,000 pages of discovery from Arctic Glacier.	McNulty
Mar. 15 - July 15, 2016	McNulty reviews 200,000+ pages of discovery.	McNulty
May 6, 2016	McNulty to specify additional custodians from whom he seeks additional discovery, including the custodian from whom he seeks the additional discovery, the reasons he needs it, and the search terms to be used.	McNulty
May 11, 2016	Parties to meet and confer regarding the additional documentary discovery McNulty seeks, if any.	All Parties
May 10, 2016	Parties disclose all potential witnesses (including affiants, declarants, deponents, and live witnesses) for Phase I, with a description of the expected testimony. Parties do not have to call all witnesses disclosed.	All Parties
May 16, 2016	Parties disclose all potential rebuttal witnesses (including affiants, declarants, deponents, and live witnesses) for Phase I, with a description of the expected testimony. Parties do not have to call all witnesses disclosed, but may not offer testimony from any witness not disclosed as of this date.	All Parties
May 18, 2016	Parties meet and confer regarding any witnesses whose testimony a party seeks to introduce only via affidavit or declaration.	All Parties
May 27, 2016	Status hearing to ensure progress is being made and hearing on any disputes regarding McNulty's requests for additional discovery.	Justice Ground and all Parties
July 15, 2016	Deadline for document discovery and to file motions to compel.	All Parties
July 15, 2016	McNulty submits documentary exhibit list, which will include all documents McNulty intends to rely on in this proceeding.	McNulty
Aug. 15, 2016	Arctic Glacier submits documentary exhibit list, which will include all documents Arctic intends to rely on in this proceeding. Each Party may rely on documents disclosed by the other.	Arctic Glacier
Aug. 22, 2016	Parties to submit rebuttal exhibits.	All parties
Sept. 5, 2016	Deadline for Parties to produce all declarations and affidavits that the Party intends to offer in support of its Phase I brief.	All parties

Date	Event	Party
Sept. 26, 2016	Deadline for all discovery, including third party discovery, depositions of relevant fact witnesses, and cross-examination of affiants and declarants.	All Parties
Oct. 7, 2016	Deadline to disclose all deposition excerpts each Party intends to rely on during Phase I and submit evidentiary objections to documents, declarations, and affidavits.	All Parties
Oct. 14, 2016	Parties produce all counter-designations of deposition testimony and submit responses to evidentiary objections to documents, declarations, and affidavits.	All Parties
Oct. 18, 2016	Parties submit evidentiary objections to deposition designations and counterdesignations.	All Parties
Oct. 21, 2016	Parties submit responses to evidentiary objections to deposition designations and counterdesignations.	All Parties
Week of Oct. 24, 2016	Rulings on evidentiary objections.	Justice Ground
Nov. 9, 2016	Submission of Joint Book containing all evidence sought and permitted to be introduced.	Arctic Glacier
Nov. 14, 2016	Parties submit Phase I briefs, limited to 25 pages, with reference to the evidence in the Joint Book.	All Parties
Nov. 23, 2016	Parties submit responses to Phase I briefs, limited to 18 pages, with reference to the evidence in the Joint Book.	All Parties
Dec. 2, 2016	Parties submit Replies to Responses to Phase 1 briefs, limited to new issues raised in the Responses, and limited to 10 pages.	All Parties
TBD	If requested by Justice Ground, hearing on Phase I, to include oral argument and live witnesses on specified issues, if Justice Ground so desires.	All Parties
TBD	Opinion of Justice Ground on Phase I.	Justice Ground
2 weeks after entry of a final order.	Deadline for serving notice on opposing Party of intent to appeal any final order to the Court of Queen's Bench in Winnipeg.	All Parties
2 weeks after appeal is resolved (or if no appeal, then 2 weeks after deadline for appeal).	Parties exchange proposed schedules for Phase 2.	All Parties